UNITED STATES DEPARTMENT OF THE INTERIOR

WASHINGTON, D.C. 20240

Secretary of the Interior_______________________ Cecil D. Andrus

Office of Hearings and Appeals____ Ruth R. Banks, Director

Office of the Solicitor____ Leo M. Krulitz, *Solicitor*

DECISIONS
OF THE
UNITED STATES
DEPARTMENT OF THE INTERIOR

EDITED BY

BETTY H. PERRY

March 3, 1849

VOLUME 87

JANUARY–DECEMBER 1980

U.S. GOVERNMENT PRINTING OFFICE, WASHINGTON: 1981

For sale by the Superintendent of Documents, U.S. Government Printing Office

Washington, D C. 20402

PREFACE

This volume of Decisions of the Department of the Interior covers the period from January 1, 1980 to December 31, 1980. It includes the most important administrative decisions and legal opinions that were rendered by officials of the Department during the period.

The Honorable Cecil D. Andrus, served as Secretary of the Interior during the period covered by this volume; Mr. James A. Joseph served as Under Secretary; Ms. Joan Davenport, Messrs. Robert Herbst, Guy Martin, Larry Meierotto, Forrest Girard served as Assistant Secretaries of the Interior; Mr. Leo Krulitz, served as Solicitor. Ms. Ruth R. Banks, served as Director, Office of Hearings and Appeals.

This volume will be cited within the Department of the Interior as "87 I.D."

Cecil D. Andrus

Secretary of the Interior.

IN MEMORIAM

FREDERICK FISHMAN

1919–1980

This volume of Decisions of the Department of the Interior is dedicated to the memory of Frederick Fishman, Administrative Judge, Board of Land Appeals, who served the Board with distinction from April 6, 1971, to November 28, 1980, the date of his death. Judge Fishman's scholarship and good judgment contributed immeasurably to the development of public land law in this country.

blank page

CONTENTS

Page
Preface II
Errata IV
Table of Decisions Reported V
Table of Opinions Reported XI
Table of Suits for Judicial Review of Published Departmental Decisions XIII
Cumulative Index To Suits for Judicial Review of Departmental Decisions XIX
Table of Cases Cited XLVII
Table of Overruled and Modified Cases LXV

Table of Statutes Cited:

    (A) Acts of Congress LXXXV
        Acts Cited by Popular Name LXXXVII
    (B) Revised Statutes LXXXVIII
    (C) United States Code LXXXVIII
Executive Orders XC
Presidential Proclamations XCI
Departmental Orders and Regulations Cited XCIII
Miscellaneous Regulations XCVI
Decisions and Opinions of the Interior Department 1
Index-Digest 517

READEX FICHE

ERRATA:

Page 19—Right col., line 24, correct to read: Plan No. 3, 60 Stat. *1097*.
Page 23—F.N. 3, 6 lines from bottom of page, correct to read: clamation No. 2487
of May 27, 1941 (*55* Stat.)
Page 53—F.N. 8, last line, correct to read: those *portions* which are excess.
Page 86—Right col., 1st complete paragraph, line 21, correct to read: *as amende*
43 U.S.C. §§ 1068–*1068b*
Page 106—Right col., line 10 correct to read: Tooisgah, 4 IBIA *189*, 82 I.D. 541
Page 308—Left column, F.N. 1—Continued, lines 13 & 14 should read: Carbon
Fuel Co., 1 IBSMA 253, 86 I.D. *483* (1979)
Page 488—Left col., 3d para., line 2 correct to read: Jackson, 38 U.S. (*13* Pet.) 498
Page 663—Right col., lines 20 & 21 correct to read: See Paragon *Jewel* Coal Co. v
Commissioner, *380* U.S. 624, 635–36 (stat-

TABLE OF DECISIONS REPORTED

Page

Aberdeen Area Director, Bureau of Indian Affairs, & Cheyenne River Sioux Tribe; Runs After, Clarence *v.*, 8 IBIA 170 (Oct. 27, 1980), 87 I.D. 501 501

Addington Brothers Mining, Inc., 2 IBSMA 90 (May 22, 1980), 87 I.D. 186 186

Administrative Appeal of Fort Berthold Land & Livestock Ass'n *v.* Area Director, Aberdeen Area Office, Bureau of Indian Affairs, 8 IBIA 90 (June 6, 1980), 87 I.D. 201 201

Administrative Appeal of Kuykendall, Marlin D. *v.* Phoenix Area Director, Bureau of Indian Affairs, & Yavapai-Prescott Tribe, 8 IBIA 76 (June 2, 1980), 87 I.D. 189 189

Alabama By-Products Corp., 2 IBSMA 298 (Sept. 30, 1980), 87 I.D. 446 446

Alaska, State of, Appeal of, 5 ANCAB 4 (Aug. 20, 1980), 87 I.D. 366 366

Alaska Gateway School District, 5 ANCAB 111 (Nov. 12, 1980), 87 I.D. 560 560

Allied Drilling, Inc., Appeals of, IBCA-1242-1-79, IBCA-1250-2-79 (Sept. 12, 1980), 87 I.D. 400 400

Almasy, Theodore J., *et al.*, Appeal of, 4 ANCAB 151 (Feb. 27, 1980), 87 I.D. 81 81

Amanda Coal Co., 2 IBSMA 395 (Dec. 22, 1980), 87 I.D. 643 643

Appeal of Almasy, Theodore J., *et al.*, 4 ANCAB 151 (Feb. 27, 1980), 87 I.D. 81 81

Page

Appeal of Bristol Bay Native Corp., 4 ANCAB 222 (May 6, 1980), 87 I.D. 164 164
  4 ANCAB 355 (July 31, 1980), 87 I.D. 341 341

Appeal of Chickaloon Moose Creek Native Ass'n, Inc., 4 ANCAB 250 (June 16, 1980), 87 I.D. 219 219

Appeal of Demit, Ellen, 4 ANCAB 217 (May 6, 1980), 87 I.D. 163 163

Appeal of Eyak Corp., 4 ANCAB 277 (June 30, 1980), 87 I.D. 279 279

Appeal of Holloway Companies (The), IBCA-1182-3-78 (Feb. 11, 1980), 87 I.D. 56 56

Appeal of J. T. Gregory & Son, Inc., IBCA-1260-4-79 (Apr. 30, 1980), 87 I.D. 154 154

Appeal of LaMar D. Construction Co., IBCA-1224-11-78 (May 20, 1980), 87 I.D. 180 180

Appeal of McAllister, Bruce, 4 ANCAB 294 (June 30, 1980), 87 I.D. 286 286

Appeal of National Institute for Community Development, Inc., IBCA-1185-3-78 (Mar. 28, 1980), 87 I.D. 116 116

Appeal of N. J. Riebe Enterprises, Inc., IBCA-1266-5-79 (July 30, 1980), 87 I.D. 337 337

Appeal of Paug-Vik, Inc., Ltd., 5 ANCAB 59 (Sept. 24, 1980), 87 I.D. 422 422

Appeal of Recon Systems, Inc., IBCA-1214-9-78 (Jan. 17, 1980), 87 I.D. 7 7

Appeal of Slater Electric Co. of Calif., IBCA-1283-7-79 (Apr. 7, 1980), 87 I.D. 121 121

	Page
Appeal of State of Alaska, 5 ANCAB 4 (Aug. 20, 1980), 87 I.D. 366	366
Appeal of Tanacross, Inc., 4 ANCAB 173 (Apr. 7, 1980), 87 I.D. 123	123
Appeal of Tiffany Construction Co., IBCA-1162-8-77 (June 12, 1980), 87 I.D. 210	210
Appeal of Washington University, IBCA-1228-11-78 (Mar. 4, 1980), 87 I.D. 88	88
Appeal of Winn, Daniel B., 5 ANCAB 19 (Aug. 25, 1980), 87 I.D. 372	372
Appeals of Allied Drilling, Inc., IBCA-1242-1-79, IBCA-1250-2-79 (Sept. 12, 1980), 87 I.D. 400	400
Appeals of Cen-Vi-Ro of Texas, Inc., IBCA-718-5-68 & 755-12-68 (June 27, 1980), 87 I.D. 230	230
Appeals of Dot Systems, Inc., IBCA-1197-6-78, IBCA-1240-8-78 (Sept. 30, 1980), 87 I.D. 450	450
Appeals of Gregory Lumber Co., IBCA-1237-12-78, 1238-12-78, 1239-12-78 & 1240-12-78 (Mar. 11, 1980), 87 I.D. 94	94
Appeals of Thein, John F.; Kenneth E. Schoonover; Wendell & Kolbjorn Skaflestad, 4 ANCAB 116 (Jan. 11, 1980), 87 I.D. 1	1
Appeals of Yale Industrial Truck, Baltimore/Washington, Inc., IBCA-1287-7-79, IBCA-1293-8-79 (Sept. 12, 1980), 87 I.D. 407	407
Area Director, Aberdeen Area Office, Bureau of Indian Affairs; Fort Berthold Land & Livestock Ass'n, *Administrative Appeal of v.*, 8 IBIA 90 (June 6, 1980), 87 I.D. 201	201
Badger Coal Co., 2 IBSMA 147 (July 25, 1980), 87 I.D. 319	319
Bethlehem Mines Corp., 2 IBSMA 215 (Aug. 29, 1980), 87 I.D. 380	380
Black Fox Mining & Development Corp., 2 IBSMA 110 (June 6, 1980), 87 I.D. 207	207
2 IBSMA 277 (Sept. 24, 1980), 87 I.D. 437	437
Black Hawk Resources Corp., 50 IBLA 399 (Oct. 24, 1980), 87 I.D. 497	497
Blackwood Fuel Co., Inc., 2 IBSMA 359 (Nov. 24, 1980), 87 I.D. 579	57
Bohme, Catlin, *et al.*; U.S. *v.* — U.S. *v.* Exxon Corp. *et al.*; U.S. *v.* Brown, Aidabelle *et al.*, 48 IBLA 267 (June 30, 1980), 87 I.D. 248	24
51 IBLA 97 (Supp.) (Nov. 5, 1980), 87 I.D. 535	53
Branham & Baker Coal Co., Inc., 2 IBSMA 209 (Aug. 28, 1980), 87 I.D. 377	37
Bristol Bay Native Corp., Appeal of, 4 ANCAB 222 (May 6, 1980), 87 I.D. 164	16
4 ANCAB 355 (July 31, 1980), 87 I.D. 341	34
Brown, Walter S. *v.* Comm'r of Indian Affairs, 8 IBIA 183 (Oct. 28, 1980), 87 I.D. 507	5
Capitol Fuels, Inc., 2 IBSMA 261 (Sept. 24, 1980), 87 I.D. 430	4
Central Oil & Gas, Inc., 2 IBSMA 308 (Oct. 23, 1980), 87 I.D. 494	4
Cen-Vi-Ro of Texas, Inc., Appeals of, IBCA-718-5-68 & 755-12-68 (June 27, 1980), 87 I.D. 230	2
Cheyenne Resources, Inc., 46 IBLA 277 (Mar. 27, 1980), 87 I.D. 110	1
Chickaloon Moose Creek Native Ass'n, Inc., Appeal of, 4 ANCAB 250 (June 16, 1980), 87 I.D. 219	
Chugach Electric Ass'n, Inc.: City of Anchorage, Alaska, & Jack G. Fisher, *et al.*, a.k.a. Concerned Chugach Citizens *v.*, 45 IBLA 171 (Jan. 30, 1980), 87 I.D. 21	

Page

City of Anchorage, Alaska, & Jack G. Fisher, *et al.*, a.k.a. Concerned Chugach Citizens *v.* Chugach Electric Ass'n, Inc., 45 IBLA 171 (Jan. 30, 1980), 87 I.D. 21 21

Claypool Construction Co., Inc., 2 IBSMA 81 (May 16, 1980), 87 I.D. 168 168

Comm'r of Indian Affairs; Brown, Walter S. *v.*, 8 IBIA 183 (Oct. 28, 1980), 87 I.D. 507 507

Consolidation Coal Co., 2 IBSMA 21 (Feb. 13, 1980), 87 I.D. 59 59

Cravat Coal Co., 2 IBSMA 136 (July 3, 1980), 87 I.D. 308 308

  2 IBSMA 249 (Sept. 23, 1980), 87 I.D. 416 416

Daniel Brothers Coal Co., 2 IBSMA 45 (Apr. 10, 1980), 87 I.D. 138 138

DeBord, Wayne E., 50 IBLA 216 (Sept. 30, 1980), 87 I.D. 465 465

Demit, Ellen, Appeal of, 4 ANCAB 217 (May 6, 1980), 87 I.D. 163 163

Dot Systems, Inc., Appeals of, IBCA-1197-6-78, IBCA-1204-8-78 (Sept. 30, 1980), 87 I.D. 450 450

Doyon, Ltd., 5 ANCAB 77 (Oct. 10, 1980), 87 I.D. 480 480

Drummond Coal Co., 2 IBSMA 96 (June 3, 1980), 87 I.D. 196 196

  2 IBSMA 189 (Aug. 6, 1980), 87 I.D. 347 347

Eastover Mining Co., 2 IBSMA 5 (Jan. 21, 1980), 87 I.D. 9 9

  2 IBSMA 70 (May 16, 1980), 87 I.D. 172 172

Estate of Hale, Leona Hunts Along, 8 IBIA 8 (Feb. 20, 1980), 87 I.D. 64 64

Estate of James, Jesse J., 8 IBIA 205 (Dec. 8, 1980), 87 I.D. 601 601

Estate of Kipp, John Joseph, 8 IBIA 30 (Mar. 14, 1980), 87 I.D. 98 98

Page

Estate of Young Bear, Victor, 8 IBIA 130 (July 24, 1980), 87 I.D. 311 311

Eyak Corp., Appeal of, 4 ANCAB 277 (June 30, 1980), 87 I.D. 279 279

Falcon Coal Co., Inc., 2 IBSMA 406 (Dec. 31, 1980), 87 I.D. 669 669

Fell Energy Coal Corp., 2 IBSMA 34 (Mar. 28, 1980), 87 I.D. 114 114

Fort Berthold Land & Livestock Ass'n, *Administrative Appeal of v.* Area Director, Aberdeen Area Office, Bureau of Indian Affairs, 8 IBIA 90 (June 6, 1980), 87 I.D. 201 201

Fox, Stephen W., 50 IBLA 186 (Sept. 30, 1980), 87 I.D. 462 462

Freese, Andrew L., 50 IBLA 26 (Sept. 9, 1980), 87 I.D. 395 395

G. R. Wright, Inc., 2 IBSMA 180 (July 29, 1980), 87 I.D. 333 333

Grafton Coal Co., Inc., 2 IBSMA 316 (Nov. 4, 1980), 87 I.D. 521 521

Green Coal Co., 2 IBSMA 199 (Aug. 19, 1980), 87 I.D. 362 362

Gregory Lumber Co., Appeals of, IBCA-1237-12-78, 1238-12-78, 1239-12-78 & 1240-12-78 (Mar. 11, 1980), 87 I.D. 94 94

Griggs, Brooks, 51 IBLA 232 (Dec. 15, 1980), 87 I.D. 612 612

Hale, Leona Hunts Along, Estate of, 8 IBIA 8 (Feb. 20, 1980), 87 I.D. 64 64

Hardly Able Coal Co., 2 IBSMA 270 (Sept. 24, 1980), 87 I.D. 434 434

  2 IBSMA 332 (Nov. 7, 1980), 87 I.D. 557 557

Hayden & Hayden Coal Co., 2 IBSMA 238 (Sept. 12, 1980), 87 I.D. 414 414

Holloway Companies, Appeal of The, IBCA-1182-3-78 (Feb. 11 1980), 87 I.D. 56 56

Page

Island Creek Coal Co., 2 IBSMA 125 (July 3, 1980), 87 I.D. 304 — 304

James, Jesse J., Estate of, 8 IBIA 205 (Dec. 8, 1980), 87 I.D. 601 — 601

J. T. Gregory & Son, Inc., Appeal of, IBCA-1260-4-79 (Apr. 30, 1980), 87 I.D. 154 — 154

Kaiser Steel Corp., 2 IBSMA 158 (July 25, 1980), 87 I.D. 324 — 324

Kin-Ark Corp., 45 IBLA 159 (Jan. 23, 1980), 87 I.D. 14 — 14

Kipp, John Joseph, Estate of, 8 IBIA 30 (Mar. 14, 1980), 87 I.D. 98 — 98

Kuykendall, Marlin D., *Administrative Appeal of v.* Phoenix Area Director, Bureau of Indian Affairs, & Yavapai-Prescott Tribe, 8 IBIA 76 (June 2, 1980), 87 I.D. 189 — 189

LaMar D. Construction Co., Appeal of, IBCA-1224-11-78 (May 20, 1980), 87 I.D. 180 — 180

Little Sandy Coal Sales, 2 IBSMA 25 (Feb. 19, 1980), 87 I.D. 61 — 61

MacElvain, Ford, 50 IBLA 303 (Oct. 7, 1980), 87 I.D. 478 — 478

McAllister, Bruce, Appeal of, 4 ANCAB 294 (June 30, 1980), 87 I.D. 286 — 286

Mantle Ranch Corp., 47 IBLA 17 (Apr. 11, 1980), 87 I.D. 143 — 143

Marietta Coal Co., 2 IBSMA 382 (Nov. 26, 1980), 87 I.D. 589 — 589

Martinez, Albert, *et al.*; U.S. *v.*, 49 IBLA 360 (Aug. 29, 1980), 87 I.D. 386 — 386

Mauersberg Coal Co., 2 IBSMA 63 (May 16, 1980), 87 I.D. 176 — 176

Miami Springs Properties, 2 IBSMA 399 (Dec. 23, 1980), 87 I.D. 645 — 645

Page

National Institute for Community Development, Inc., Appeal of, IBCA-1185-3-78 (Mar. 28, 1980), 87 I.D. 116 — 116

N.J. Riebe Enterprises, Inc., Appeal of, IBCA-1266-5-79 (July 30, 1980), 87 I.D. 337 — 337

Northway Natives, Inc., 5 ANCAB 123 (Dec. 12, 1980), 87 I.D. 603 — 603

Old Ben Coal Co., 2 IBSMA 38 (Apr. 3, 1980), 87 I.D. 119 — 119

Paug-Vik, Inc., Ltd., Appeal of, 5 ANCAB 59 (Sept. 24, 1980), 87 I.D. 422 — 422

Phoenix Area Director, Bureau of Indian Affairs, & Yavapai-Prescott Tribe; Kuykendall, Marlin D., *Administrative Appeal of v.*, 8 IBIA 76 (June 2, 1980), 87 I.D. 189 — 189

Roberts Brothers Coal Co., Inc., 2 IBSMA 284 (Sept. 26, 1980), 87 I.D. 439 — 439

Recon Systems, Inc., Appeal of, IBCA-1214-9-78 (Jan. 17, 1980), 87 I.D. 7 — 7

Renfro Construction Co., Inc., 2 IBSMA 372 (Nov. 26, 1980), 87 I.D. 584 — 584

Runs After, Clarence *v.* Aberdeen Area Director, Bureau of Indian Affairs, & Cheyenne River Sioux Tribe, 8 IBIA 170 (Oct. 27, 1980), 87 I.D. 501 — 501

Sabin, Lite, 51 IBLA 226 (Dec. 15, 1980), 87 I.D. 610 — 610

Slater Electric Co. of Calif., Appeal of, IBCA-1283-7-79 (Apr. 7, 1980), 87 I.D. 121 — 121

State of Alaska, Appeal of, 5 ANCAB 4 (Aug. 20, 1980), 87 I.D. 366 — 366

Sunbeam Coal Corp., 2 IBSMA 222 (Aug. 29, 1980), 87 I.D. 383 — 383

Tanacross, Inc., Appeal of, 4 ANCAB 173 (Apr. 7, 1980), 87 I.D. 123 — 123

Page

Texaco, Inc., Gulf Oil Exploration & Production Co., 51 IBLA 332 (Dec. 29, 1980), 87 I.D. 648 ---- 648

Thein, John F.; Kenneth E. Schoonover; Wendell & Kolbjorn Skaflestad, Appeals of, 4 ANCAB 116 (Jan. 11, 1980), 87 I.D. 1 ---- 1

Tiffany Construction Co., Appeal of, IBCA-1162-8-77 (June 12, 1980), 87 I.D. 210 ---- 210

Tollage Creek Elkhorn Mining Co., 2 IBSMA 341 (Nov. 24, 1980), 87 I.D. 570 ---- 570

Toptiki Coal Corp., 2 IBSMA 173 (July 28, 1980), 87 I.D. 331 ---- 331

Tuttle, J. Burton, 49 IBLA 278 (Aug. 18, 1980), 87 I.D. 350 ---- 350

U.S. *v.* Bohme, Catlin, *et al.*; U.S. *v.* Exxon Corp. *et al.*; U.S. *v.* Brown, Aidabelle, *et al.*, 48 IBLA 267 (June 30, 1980) 87 I.D. 248 ---- 248

51 IBLA 97 (Supp.) (Nov. 5, 1980), 87 I.D. 535 ---- 535

U.S. *v.* Martinez, Albert, *et al.*, 49 IBLA 360 (Aug. 29, 1980), 87 I.D. 386 ---- 386

U.S. *v.* Williamson, Clare & Lapine Pumice Co., 45 IBLA 264 (Feb. 4, 1980), 87 I.D. 34 ---- 34

Page

U.S. *v.* Wood, W.S., *et al.*, 51 IBLA 301 (Dec. 18, 1980), 87 I.D. 628 ---- 628

U.S. Steel Corp., 50 IBLA 190 (Sept. 30, 1980), 87 I.D. 473 ---- 473

Virginia Iron, Coal & Coke Co., 2 IBSMA 165 (July 28, 1980), 87 I.D. 327 ---- 327

Washington University, Appeal of, IBCA-1228-11-78 (Mar. 4, 1980), 87 I.D. 88 ---- 88

Williamson, Clare & Lapine Pumice Co.; U.S *v.*, 45 IBLA 264 (Feb. 4, 1980), 87 I.D. 34 ---- 34

Wilson Farms Coal Co., 2 IBSMA 118 (June 27, 1980), 87 I.D. 245 ---- 245

Winn, Daniel B., Appeal of, 5 ANCAB 19 (Aug. 25, 1980), 87 I.D. 372 ---- 372

Wolverine Coal Corp., 2 IBSMA 325 (Nov. 7, 1980), 87 I.D. 554 ---- 554

Wood, W.S., *et al.*; U.S. *v.* 51 IBLA 301 (Dec. 18, 1980), 87 I.D. 628 ---- 628

Yale Industrial Trucks, Baltimore/Washington, Inc., Appeals of, IBCA-1287-7-79, IBCA-1293-8-79 (Sept. 12, 1980), 87 I.D. 407 ---- 407

Young Bear, Victor, Estate of, 8 IBIA 130 (July 24, 1980), 87 I.D. 311 ---- 311

Zapata Coal Corp., 2 IBSMA 9 (Jan. 22, 1980), 87 I.D. 11 ---- 11

blank page

TABLE OF OPINIONS REPORTED

Page

Application of the Endangered Species Act to Native Americans with Treaty Hunting and Fishing Rights, M-36926 (Nov. 4, 1980), 87 I.D. 525 ... 525

Clarification of Authorities & Responsibilities for Identifying & Protecting Cultural Resources on the Outer Continental Shelf, M-36928 (Nov. 24, 1980), 87 I.D. 593 ... 593

Effect of the Crude Oil Windfall Profit Tax Act of 1980 on the States' Share of Federal Oil Royalties, M-36929 (Dec. 30, 1980), 87 I.D. 661 ... 661

Extent to Which the National Historic Preservation Act Requires Cultural Resources to be Identified & Considered in the Grant of a Federal Right-of-way, M-36917 (Dec. 6, 1979) 87 I.D. 27 ... 27

Gulf of Mexico Exemption from Sec. 25 of the Outer Continental Shelf Lands Act, *as amended*, M-36923 (Nov. 5, 1980), 87 I.D. 544 ... 544

Page

New OCS Unitization Rules—Authority of the Secretary to Segregate Partially Unitized Offshore Leases, M-36927 (Dec. 16, 1980), 87 I.D. 616 ... 616

On-Structure, Deep Stratigraphic Test Wells, M-36922 (Oct. 29, 1980), 87 I.D. 517 ... 517

Reduction of Production Royalties Below Statutory Minimum Rates, M-36920 (Dec. 11, 1979), 87 I.D. 69 ... 69

Reimbursement for Geological and Geophysical Data and Information; Exxon's Petition to Revise 30 CFR Parts 250, 251 and 252, M-36924 (Nov. 17, 1980), 87 I.D. 563 ... 563

Right-of-way Requirements for Gathering Lines & Other Production Facilities Located Within Oil & Gas Leaseholds, M-36921 (June 19, 1980), 87 I.D. 291 ... 291

blank page

TABLE OF SUITS FOR JUDICIAL REVIEW OF PUBLISHED DEPARTMENTAL DECISIONS

Page

Adams, Alonzo A. *et al.* *v.* Witmer *et al.* xxxix
Adler Construction Co. *v.* U.S. xix
Akers, Dolly Cusker *v.* Dept. of the Interior xix
Alaska, State of *v.* Alaska Native Claims Appeal Board *et al.* xxiv
Allied Contractors, Inc. *v.* U.S. xx
American Coal Co. *v.* Dept. of the Interior xx
Atlantic Richfield Co. *v.* Hickel xxxv
Atlantic Richfield Co. & Fasco, Inc. *v.* Morton, Rogers C. B. *et al.* xx, xxx
Atwood *et al.* *v.* Udall xxxvii

Baciarelli, Elverna Yevonne Clairmont *v.* Morton xxiii
Baker, Phil *v.* Dept. of the Interior xx
Barash, Max *v.* McKay xx
Barnard-Curtiss Co. *v.* U.S. xxi
Barrows, Esther, as an Individual and as Executrix of the Last Will of E. A. Barrows, Deceased *v.* Hickel xxxix
Bennett, William, Paul F. Goad & United Mine Workers *v.* Kleppe xxi
Bergesen, Sam *v.* U.S. xxi
Billmeyer, John, etc. *v.* U.S. xxviii
Bishop Coal Co. *v.* Kleppe, Thomas S. xxxv
Block, J. L. *v.* Morton, Rogers, Secretary of the Interior xxxix
Booth, Lloyd W. *v.* Hickel xxxix
Bowen *v.* Chem-Cote Perlite xxii
Bowman, James Houston *v.* Udall xxxv
Boyle, Alice A. & Carrie H. *v.* Morton xxxix

Page

Bradford Mining Corp., Successor of J. R. Osborne *v.* Andrus, Cecil D. xliii
Brown, Melvin A. *v.* Udall xxi
Brown, Penelope Chase *v.* Udall xxxviii
Brubaker, R. W., a/k/a Ronald W., B. A. Brubaker a/k/a Barbara A. & William J. Mann a/k/a W. J. *v.* Morton xl
Buch, R. C. *v.* Udall, Stewart L. xxi
Bunkowski, Henretta & Andrew Julius *v.* Applegate, L. Paul, District Manager, Bureau of Land Mgmt., *et al.* xl
Bunn, Thomas M. *v.* Udall xxxiv
Burkybile, Doris Whiz *v.* Smith, Alvis, Sr., as Guardian Ad Litem for Zelma, Vernon, Kenneth, Mona & Joseph Smith, Minors, *et al.* xlv

California Co., The *v.* Udall xxii
California Oil Co. *v.* Sec xxxvi
Cameron Parish Police Jury *v.* Udall *et al.* xxii
Canterbury Coal Co. *v.* Kleppe, Thomas S. xxii
Carson Construction Co. *v.* U.S. xxii
Clarkson, Stephen H. *v.* U.S. xxii
COAC, Inc. *v.* U.S. xxii
Cohen, Hannah and Abram *v.* U.S. xxiii
Colson, Barney R. *et al.* *v.* Udall xxiii
Confederated Tribes & Bands of the Yakima Indian Nation *v.* Kleppe, Thomas S. *et al.* xliv
Confederated Tribes & Bands of the Yakima Indian Nation *v.* Kleppe, Thomas S., Secretary of the Interior & Erwin Ray xxv

Page

Consolidated Gas Supply Corp. *v.* Udall *et al* ------ XXI, XXVII, XXIX
Continental Oil Co. *v.* Udall *et al* ------------------------ XXIII
Converse, Ford M. *v.* Udall ----- XL
Cosmo Construction Co. *et al.* *v.* U.S. ------------------------ XXIII
Cuccia, Louise & Shell Co. *v.* Udall ---------------------- XXX

Darling, Bernard E. *v.* Udall ----- XXIX
Denison, Marie W. *v.* Udall ----- XL
Dredge Co. *v.* Husite Co ------- XXIV
Dredge Corp., The *v.* Penny ---- XXIV
Duesing, Bert F. *v.* Udall ----- XXXVII

Equity Oil Co. *v.* Udall ------- XXXVIII
Erskra, Constance Jean Hollen *v.* Morton *et al* -------------- XLIV
Evans, David H. *v.* Morton ----- XXV

Farrelly, John J. & the Fifty-One Oil Co. *v.* McKay -------- XXV
Foote Mineral Co. *v.* Andrus, Cecil D. *et al* -------------- XXV
Foster, Everett *et al.* *v.* Seaton -- XL
Foster, Gladys H., Executrix of the Estate of T. Jack Foster *v.* Udall, Stewart L., Boyd L. Rasmussen ---------------- XXV
Foster, Katherine S. & Brook H. Duncan, II, *v.* Udall --------- XXI
Freeman, Autrice Copeland *v.* Udall ---------------------- XX

Gabbs Exploration Co. *v.* Udall - XXV, XXXVIII
Garigan, Philip T. *v.* Udall ------ XXX
Gathofner, Stanley *v.* Udall ----- XXVI
Geikaunmah Mammedaty, Juanita & Imogene Geikaunmah Carter *v.* Morton ------------ XXVI
General Excavating Co. *v.* U.S. -- XXVI
Gerttula, Nelson A. *v.* Udall ---- XXVI
Goodwin, James C. *v.* Andrus, Dale R., State Dir., BLM, *et al* --------------------- XXVI
Grigg, Golden T. *et al.* v. U.S. & Morton ------------------ XL
Griggs, William H. *v.* Solan ---- XXVII
Gucker, George L. *v.* Udall ----- XXXII
Guthrie, Electrical Construction Co. *v.* U.S ----------------- XXVI

Hansen, Raymond J. *v.* Seaton --- XXV
Hansen, Raymond J. *et al.* *v.* Udall ---------------------- XXVII
Hayes, Joe *v.* Seaton -------- XXXVII
Henault Mining Co. *v.* Tysk *et al* -- XL
Henrikson, Charles H. *et al.* *v.* Udall *et al* ---------------- XL
Higgins, Jesse *et al.* *v.* Andrus, Cecil D ------------------ XXVII
Hill, Houston Bus *v.* Morton --- XXXIV
Hill, Houston Bus & Thurman S. Hurst *v.* Morton ------------ XXXIV
Hinton, S. Jack *et al.* *v.* Udall --- XXXV
Holland Livestock Ranch *et al.* *v.* U.S., Andrus, *et al* -------- XXI
Holt, Kenneth etc. *v.* U.S ------ XXVII
Hope Natural Gas Co. *v.* Udall --- XXVII, XXIX
Huff, Thomas J. *v.* Asenap ----- XLVI
Huff, Thomas J. *v.* Udall ------- XLVI
Hugg, Harlan H. *et al.* *v.* Udall - XXXVIII
Humboldt Placer Mining Co. & Del De Rosier *v.* Sec. of the Interior ------------------- XLI

Ideal Basic Industries, Inc. (formerly known as Ideal Cement Co.) *v.* Morton --------- XLI
Independent Quick Silver Co., an Oregon Corp. *v.* Udall ------ XLI
International Union of United Mine Workers of America *v.* Hathaway ------------------ XLVI
International Union of United Mine Workers of America *v.* Morton ------------------- XXIV
Iverson, C. J. *v.* Frizzell, Kent, Acting Secretary & Dorothy D. Rupe ----------------- XXVIII

J. A. Terteling & Sons, Inc. *v.* U.S ---------------------- XXVIII
J.D. Armstrong Inc. *v.* U.S ------ XXVIII
Johnson, Leroy V. & Roy H., Marlene Johnson Exendine & Ruth Johnson Jones *v.* Kleppe, Thomas S., Secretary of the Interior ------------------- XXIII
Johnson, Menzel G. *v.* Morton *et al* ---------------------- XXVIII
June Oil & Gas, Inc., Cook Oil & Gas, Inc. *v.* Andrus *et al* ------ XXVIII

Page
Kalerak, Andrew J., Jr., *et al.* *v.* Udall xix
Krueger, Max L. *v.* Seaton xxix

Laden, George C., Louis Wedekind, Mrs. Vern Lear, Mrs. Arda Fritz & Helen Laden Wagner, Heirs of George H. Wedekind, Deceased *v.* Morton *et al* xxxvi
Lamp, Benson J. *v.* Andrus *et al* xxv
Lance, Richard Dean *v.* Udall *et al* xli
La Rue, W. Dalton, Sr. *v.* Udall xxix
L. B. Samford, Inc. *v.* U.S. xxix
Lewis, Gary Carson, etc., *et. al.* *v.* General Services Admin. *et al* xxxi
Lewis, Ruth Pinto, Individually & as the Administratrix of the Estate of Ignacio Pinto *v.* Kleppe, Thomas S., Secretary of the Interior & the U.S xxix
Liss, Merwin E. *v.* Seaton xxiii
Lutey, Bess May *et al.* *v.* Dept. of Agriculture, BLM *et al* xxix
Lutzenhiser, Earl M. & Leo J. Kottas *v.* Udall *et al* xxviii

McCall, William A., Sr., & The Dredge Corp. & Olaf H. Nelson *v.* Boyles, John F. *et al* xli
McCall, William A., Sr., & the Estate of Olaf Henry Nelson, Deceased *v.* Boyles, John S., District Manager, Bureau of Land Management, *et al* xli
McClarty, Kenneth *v.* Udall *et al* xli
McGahan, Kenneth *v.* Udall xxix
McIntosh, Samuel W. *v.* Udall xxxi
McKenna, Elgin A. (Mrs.), as Executrix of the Estate of Patrick A. McKenna, Deceased *v.* Udall xxix
McKenna, Elgin A. (Mrs.), Widow & Successor in Interest of Patrick A. McKenna, Deceased *v.* Hickel xxix
McKenna, Patrick A. *v.* Davis xxiv
McKinnon, A. G. *v.* U.S xxx

Page
McMaster, Raymond C. *v.* U.S., Dept. of the Interior, *et al* xxx
McNeil, Wade *v.* Leonard *et al* xxx
McNeil, Wade *v.* Seaton xxx
McNeil, Wade *v.* Udall xxx
Maher, Charles & L. Franklin Mader *v.* Morton xli
Marathon Oil Co. *v.* Morton *et al* xx, xxx
Megna, Salvatore, Guardian etc. *v.* Seaton xxx
Melluzzo, Frank & Wanita *v.* Andrus xlii
Melluzzo, Frank & Wanita *v.* Morton xlii
Meva Corp. *v.* U.S xxx
Miller, Duncan *v.* Udall, 69 I.D. 14 (1962) xxxiii
Miller, Duncan *v.* Udall, 70 I.D. 1 (1963) xxxi
Miller, Duncan *v.* Udall (A-30546, A-30566 & 73 I.D. 211 (1966) xxxi
Mineral Ventures, Ltd. *v.* Secretary of the Interior xlii
Morgan, Henry S. *v.* Udall xxxi
Morris, G. Patrick, Joan E. Roth, Elise L. Neeley, *et al.* *v.* U.S. & Morton xlii
Morris, Jonathan *et al.* *v.* Kleppe xxxvii
Morrison-Kundsen Co., Inc. *v.* U.S xxxi
Mullins, Howard *v.* Andrus, Cecil D xxxiii
Munsey, Glenn *v.* Andrus, Cecil D xxxi

Napier, Barnette T. *et al.* *v.* Sec xxxviii
Native Village of Tyonek *v.* Bennett xxxii
Navajo Tribe of Indians *v.* Morton *et al* xxxi
Neuhoff, Edward D. & E. L. Cord *v.* Morton xxiii
New Jersey Zinc Corp., a Del. Corp. *v.* Udall xlii
New York State Natural Gas Corp. *v.* Udall xxi

Page

O'Callaghan, Lloyd, Sr., Individually & as Executor of the Estate of Ross O'Callaghan *v.* Morton *et al* — xlii
Oelschlaeger, Richard L. *v.* Udall — xxxi
Oil Resources, Inc. *v.* Andrus, Cecil D — xxxii
Oil Shale Corp. *et al.* *v.* Sec — xxxviii
Oil Shale Corp. *et al.* *v.* Udall — xxxviii
Old Ben Coal Corp. *v.* Interior Board of Mine Operations Appeals *et al* — xxxii
Osborne, J. R. *v.* Morton — xliii
Ounalashka Corp., for & on behalf of its Shareholders *v.* Kleppe, Thomas S. *et al* — xxxii

Pan American Petroleum Corp. *v.* Udall — xxvi
Parks, Jack W. *v.* Kleppe, Thomas S — xxxii
Paul Jarvis, Inc. *v.* U.S — xxxii
Pease *v.* Udall — xxxii
Peter Kiewit Sons' Co. *v.* U.S — xxxiii
Peters, Curtis D. *v.* Morton — xxxiii
Pittsburgh Pacific C . *v.* U.S., Andrus, *et al* — xliii
Pocahontas Fuel Co. *v.* Andrus, Cecil D — xxxiii
Port Blakely Mill Co. *v.* U.S — xxxiii
Pressentin E. V., Fred J. Martin, Administrator of H. A. Martin Estate *v.* Udall & Stoddard — xliii
Price, Robert *v.* Morton *et al* — xxiv

Ray D. Bolander Co., Inc. *v.* U.S — xxxiii
Reed, George, Sr. *v.* Morton *et al* — xxxiii
Reed, Wallace *et al.* *v.* U.S. *et al* — xxvii
Reeves, Alvin B. *et al.* *v.* Morton & The City of Phoenix — xxxiii
Reliable Coal Corp. *v.* Morton *et al* — xxxiv
Republic Steel Corp. *v.* Interior Board of Mine Operations Appeals — xxxiv
Rhyneer, George S. *et al.* *v.* Andrus, Cecil *et al* — xx

Page

Richards, Theodore A. & Judith Miller *v.* Secretary of the Interior & Seldovia Native Ass'n, Inc — xx
Richfield Oil Corp. *v.* Seaton — xxxiv
Ringstad, Mark B. *et al.* *v.* U.S., Secretary of the Interior & Arctic Slope Regional Corp — xxii
Robedeaux, Oneta Lamb *et al.* *v.* Morton — xxxiv
Roberts, Kenneth *et al.* *v.* Morton *et al* — xliv
Robinson, Rene by & through her Guardian Ad Litem, Nancy Clifford *v.* Andrus, Cecil, Gretchen Robinson & Trixi Lynn Robinson Harris — xxxiv
Rosebud Coal Sales Co. *v.* Andrus, Cecil D. *et al* — xxxiv
Rowe, Richard W. & Daniel Gaudiane *v.* Hathaway — xxxiv

Safarik *v.* Udall — xxv
Sam, Christine & Nancy Judge *v.* Kleppe, Thomas S., Secretary of the Interior — xxviii
Savage, John W. *v.* Udall — xxxviii
Schulein, Robert *v.* Udall — xxvii
Scott, Clara Ramsey *v.* U.S. *et al* — xxxiii
Seal & Co., Inc. *v.* U.S — xxxv
Sessions, Inc. *v.* Morton *et al* — xxxv
Shaw, William T. *et al.* *v.* Morton *et al* — xlv
Shell Oil Co. *v.* Udall — xxii, xxxv
Shell Oil Co. & D. A. Shale, Inc. *v.* Morton — xliv
Shell Oil Co. *et al.* *v.* Udall *et al* — xlv
Shoup, Leo E. *v.* Udall — xl
Sinclair Oil & Gas Co. *v.* Udall *et al* — xxxv
Sink, Charles T. *v.* Kleppe & MESA — xxxv
Smith, Reid *v.* Udall *etc* — xl
Snyder, Ruth, Administratrix of the Estate of C. F. Snyder, Deceased *et al.* *v.* Udall — xliii
South Dakota, State of *v.* Andrus *et al* — xliii
Southern Pacific Co. *v.* Hickel — xxxv

	Page
Southern Pacific Co. *et al.* *v.* Morton *et al*	XLIII
Southwest Welding *v.* U.S.	XXXVI
Southwestern Petroleum Corp. *v.* Udall	XXVI, XXXVI
Standard Oil Co. of Calif. *v.* Hickel *et al*	XXXVI
Standard Oil Co. of Calif. *v.* Morton *et al*	XXXVI
Steele, J. A. *et al.* *v.* Kleppe, Thomas S., Secretary of the Interior	XXI
Stevens, Clarence T. & Mary D. *v.* Hickel	XLIII
Stewart Capital Corp. *et al.* *v.* Andrus	XXIV
Still, Edwin *et al.* *v.* U.S	XXVI
Superior Oil Co. *v.* Bennett	XXXII
Superior Oil Co. *et al.* *v.* Udall	XXXVII
Swanson, Elmer H. *v.* Morton, Rogers C. B	XLIII
Swanson, Elmer H. & Livingston Silver, Inc. *v.* Andrus, Cecil D	XLIII
Tallman, James K. *et al.* *v.* Udall	XXXVI
Texaco, Inc., a Corp. *v.* Secretary of the Interior	XXXVI
Texas Construction Co. *v.* U.S	XXXVI
Thom Properties Inc., d/b/a Toke Cleaners & Launderers *v.* U.S. Government *et al*	XXXVII
Thor-Westcliffe Development, Inc. *v.* Udall	XXXVII
Thor-Westcliffe Development, Inc. *v.* Udall, *et al*	XXXVII
Tooisgah, Jonathan Morris & Velma *v.* Kleppe, Thomas S., Secretary of the Interior	XXXVII
Umpleby, Joseph B. *et al.* *v.* Udall	XXXVIII
Union Oil Co. of Calif. *v.* Udall	XXXVII
Union Oil Co. of Calif., a Corp. *v.* Udall	XXXVIII
United Mine Workers of America *v.* Andrus (No. 77-1090)	XXIV
United Mine Workers of America *v.* Andrus (No. 77-1839)	XX
United Mine Workers of America *v.* Andrus (No. 77-1840)	XXXII
United Mine Workers of America *v.* Interior Board of Mine Operations Appeals	XXIV
United Mine Workers of America *v.* U.S. Interior Board of Mine Operations Appeals	XXXII
United Mine Workers of America (Dist. 6) *et al.* *v.* Interior Board of Mine Operations Appeals	XXVII
United Mine Workers of America *v.* Kleppe (No. 76-1980)	XXIII
United Mine Workers of America *v.* Kleppe (No. 76-1377)	XXXIX
United Mine Workers of America *v.* Kleppe (No. 76-1208)	XXII
United Mine Workers of America (Local Union No. 1993) *v.* Andrus, Cecil D	XXXIX
U.S. *v.* Adams, Alonzo A	XXXIX
U.S. *v.* Hood Corp. *et al*	XXVII
U.S. *v.* Michener, Raymond T. *et al*	XXVII
U.S. *v.* Nogueira, Edison R. & Maria A. F. Nogueira	XLII
U.S. & Morton *v.* Wharton, Minnie E. & John W., *et al*	XLV
Vaughey, E. A. *v.* Seaton	XLIV
Verrue, Alfred N. *v.* U.S. *et al*	XLIV
Wackerli, Burt & Lueva G., *et al.* *v.* Udall, *et al*	XLIV
Wallis, Floyd A. *v.* Udall	XXVIII
Ward, Alfred, Irene Ward Wise & Elizabeth Collins *v.* Frizzell, Kent, Acting Secretary, *et al*	XLV
Weardco Construction Corp. *v.* U.S	XLV
Western Nuclear, Inc. *v.* Andrus, Cecil & U.S	XLV
White, Vernon O. & Ina C. *v.* Udall	XLIV

Page

Wisenak, Inc., an Alaska Corp. *v.* Kleppe, Thomas S., Secretary of the Interior & U.S ---- XLV

WJM Mining & Development Co. *et al.* *v.* Morton ---------- XLII

Wyoming, State of, Albert E. King, Comm'r of Public Lands *v.* Andrus, Cecil D ---------- XLVI

Page

Wyoming, State of, *et al.* *v.* Udall, etc ---------------------- XXXIX

Zeigler, Coal Co. *v.* Frizzell, Kent, Acting Secretary ------ XLVI

Zwang, Darrell & Elodymae *v.* Andrus, Cecil D., Secretary of the Interior ---------------- XLIV

Zweifel, Merle I. *et al.* *v.* U.S --- XLIV

CUMULATIVE INDEX TO SUITS FOR JUDICIAL REVIEW OF DEPARTMENTAL DECISIONS PUBLISHED IN INTERIOR DECISIONS

The table below sets out in alphabetical order, arranged according to the last name of the first party named in the Department's decision, all the departmental decisions published in the Interior Decisions, beginning with volume 61, judicial review of which was sought by one of the parties concerned. The name of the action is listed as it appears on the court docket in each court. Where the decision of the court has been published, the citation is given, if not, the docket number and date of final action taken by the court is set out. If the court issued an opinion in a nonreported case, that fact is indicated; otherwise no opinion was written. Unless otherwise indicated, all suits were commenced in the United States District Court for the District of Columbia and, if appealed, were appealed to the United States Court of Appeals for the District of Columbia Circuit. Finally, if judicial review resulted in a futher departmental decision, the departmental decision is cited. Actions shown are those taken prior to the end of the year covered by this volume.

Adler Construction Co., 67 I.D. 21 (1960) (Reconsideration)

Adler Construction Co. v. *U.S.*, Cong. 10–60. Dismissed, 423 F. 2d 1362 (1970); *rehearing denied*, July 15, 1970; *cert. denied*, 400 U.S. 993 (1970); *rehearing denied*, 401 U.S. 949 (1971).

Adler Construction Co. v. *U.S.*, Cong. 5–70. Trial Commr's report accepting & approving the stipulated agreement filed Sept. 11, 1972.

Estate of John J. Akers, 1 IBIA 8; 77 I.D. 268 (1970)

Dolly Cusker Akers v. *The Dept. of the Interior*, Civil No. 907, D. Mont. Judgment for defendant, Sept. 17, 1971; order staying execution of judgment for 30 days issued Oct. 15, 1971; appeal dismissed for lack of prosecution, May 3, 1972; appeal reinstated, June 29, 1972; aff'd, 499 F. 2d 44 (9th Cir. 1974).

State of Alaska, Andrew Kalerak, Jr., 73 I.D. 1 (1966)

Andrew J. Kalerak, Jr., et al. v. *Stewart L. Udall*, Civil No. A-35-66, D. Alaska. Judgment for plaintiff, Oct. 20 1966, rev'd, 396 F.2d 746 (9th Cir. 1968); *cert. den.*, 393 U.S. 1118 (1969).

Appeals of the State of Alaska & Seldovia Native Ass'n, Inc., 2 ANCAB 1, 84 I.D. 349 (1977)

Theodore A. Richards & Judith Miller v. *The Secretary of the Interior & Seldovia Native Ass'n, Inc.*, Civil No. A78-170-CIV, D. Alaska. Suit pending.

George S. Rhyneer, Walter M. Johnson, David Vanderbrink, Vivian MacInnes, Bruce McAllister & Alan V. Hanson v. *Cecil Andrus, Secretary of the Interior, Seldovia Native Ass'n, Inc., Cook Inlet Region, Inc., Robert Leresche, Comm'r of Natural Resources of the State of Alaska*, Civil No. A78-240 CIV, D. Alaska. Suit pending.

Allied Contractors, Inc., 68 I.D. 145 (1961)

Allied Contractors, Inc. v. *U.S.*, Ct. Cl. No. 163-64. Stipulation of settlement filed Mar. 3, 1967; compromised.

American Coal Co., 84 I.D. 394 (1977)

American Coal Co. v. *Department of the Interior*, No. 77-1604, United States Ct. of Appeals, 10th Cir. Dismissed on motion of Petitioner, Nov. 23, 1977.

Armco Steel Corp., 84 I.D. 454 (1977)

United Mine Workers of America v. *Cecil D. Andrus*, No. 77-1839, United States Ct. of Appeals, D.C. Cir. Suit pending.

Atlantic Richfield Co., Marathon Oil Co., 81 I.D. 457 (1974)

Marathon Oil Co. v. *Rogers C.B. Morton, Secretary of the Interior, et al.* Civil No. C 74-180. D. Wyo.

Atlantic Richfield Co. & Pasco, Inc. v. *Rogers C. B. Morton, Secretary of the Interior, Vincent E. McKelvey, Dir. of Geological Survey, & C. J. Curtis, Area O &G Supervisor, Geological Survey*, Civil No. C74-181. D. Wyo.

Actions consolidated; judgment for Plaintiff, 407 F. Supp. 1301 (1975); aff'd, 556 F. 2d 982 (10th Cir. 1977).

Leslie N. Baker et al., A-28454 (Oct. 26, 1960). On reconsideration *Autrice C. Copeland*, 69 I.D. 1 (1962)

Autrice Copeland Freeman v. *Stewart L. Udall*, Civil No. 1578, D. Ariz. Judgment for defendant, Sept. 3, 1963 (opinion); aff'd, 366 F. 2d 706 (9th Cir. 1964); no petition.

Phil Baker, 84 I.D. 877 (1977)

Phil Baker v. *Department of the Interior*, No 77-1973, United States Ct. of Appeals, D.C. Cir. Aff'd in part & rev'd in part, Nov. 29, 1978.

Max Barash, The Texas Co., 63 I.D. 51 (1956)

Max Barash v. *Douglas McKay*, Civil No. 939-56. Judgment for defendant, June 13, 1977; rev'd & remanded, 256 F. 2d 714 (1958); judgment for plaintiff, Dec. 18, 1958. Supplemental decision, 66 I.D. 11 (1958); no petition.

Barnard-Curtiss Co., 64 I.D. 312 (1957); 65 I.D. 49 (1958)

Barnard-Curtiss Co. v. *U.S.*, Ct. Cl. No. 491-59. Judgment for plaintiff, 301 F. 2d 909 (1962).

Eugenia Bate, 69 I.D. 230 (1962).

Katherine S. Foster & Brook H. Duncan II v. *Stewart L. Udall*, Civil No. 5258, D.N.M. Judgment for defendant, Jan. 8, 1964; rev'd 335 F. 2d 828 (10th Cir. 1964); no petition.

Robert L. Beery et al., 25 IBLA 287; 83 I.D. 249 (1976)

J. A. Steele et. al. v. *Thomas S. Kleppe in his capacity as Secretary of the Interior, & U.S.*, Civil No. C76-1840, N.D. Cal. Aff'd, June 27, 1978; no appeal.

Sam Bergesen, 62 I.D. 295 (1955)
Reconsideration denied, IBCA-11 (Dec. 19, 1955)

Sam Bergesen v. *U.S.*, Civil No. 2044, D. Wash. Complaint dismissed Mar. 11, 1958; no appeal.

Bishop Coal Co., 82 I.D. 553 (1975)

William Bennett, Paul F. Goad & United Mine Workers v. *Thomas S. Kleppe, Secretary of the Interior*, No. 75-2158, United States Ct. of Appeals, D.C. Cir. Suit pending.

BLM-A-045569, 70 I.D. 231 (1963)

New York State Natural Gas Corp. v. *Stewart L. Udall*, Civil No. 2109-63.

Consolidated Gas Supply Corp v. *Stewart L. Udall et al.*, Civil No. 2109-63. Judgment for defendant, Sept. 20, 1965; Per curiam decision, aff'd, Apr.28, 1966; no petition.

Melvin A. Brown, 69 I.D. 131 (1962)

Melvin A. Brown v. *Stewart L. Udall*, Civil No. 3352-62. Judgment for defendant, Sept. 17, 1963; rev'd, 335 F. 2d 706 (1964); no petition.

R. C. Buch, 75 I.D. 140 (1968)

R. C. Buch v. *Stewart L. Udall*, Civil No. 68-1358-PH, C.D. Cal. Judgment for plaintiff, 298 F. Supp. 381 (1969); rev'd, 449 F. 2d 600 (9th Cir. 1971); Judgment for defendant, Mar. 10, 1972.

Bureau of Land Management v. *Holland Livestock Ranch et al.*, 39 IBLA 272; 86 I.D. 133 (1979)

Holland Livestock Ranch, a Co-Partnership composed of Bright-Holland Co., Marimont-Holland Co., & Nemmeroff-Holland Co., & John J. Casey v. *U.S., Cecil Andrus, Secretary of the Interior, Edward Roland, Cal. State Director, BLM, & Edward Hastey, Nevada State Dir., BLM, et al.*, Civil No. R-79-78-HEC, D. Nev. Suit pending.

The California Co., 66 I.D. 54 (1959)

The California Co. v. *Stewart L. Udall*, Civil No. 980–59. Judgment for defendant, 187 F. Supp. 445 (1960); aff'd, 296 F. 2d 384 (1961).

In the Matter of Cameron Parish, Louisiana, Cameron Parish Police Jury & Cameron Parish School Board, June 3, 1968, appealed by Secretary July 5, 1968, 75 I.D. 289 (1968)

Cameron Parish Police Jury v. *Stewart L. Udall et al.*, Civil No. 14–206, W. D. La. Judgment for plaintiff, 302 F. Supp. 689 (1969); order vacating prior order issued Nov. 5, 1969.

James W. Canon et al., 84 I.D. 176 (1977)

Mark B. Ringstad, William I. Waugaman, William N. Allen III, Nils Braastad, Elmer Price, Dan Ramras, & Kenneth L. Rankin v. *U.S., Secretary of the Interior, & The Arctic Slope Regional Corp.*, Civil No. A78–32–Civ, D. Alaska. Suit pending.

Canterbury Coal Co., 83 I.D. 325 (1976)

Canterbury Coal Co. v. *Thomas S. Kleppe*, No. 76–2323. United States Ct. of Appeals, 3d Cir. Aff'd, per curiam, June 15, 1977.

Carbon Fuel Co., 83 I.D. 39 (1976)

United Mine Workers of America v. *Thomas S. Kleppe*, No. 76–1208, United States Ct. Appeals, D.C. Cir. Suit pending.

Carson Construction Co., 62 I.D. 422 (1955)

Carson Construction Co. v. *U.S.*, Ct. Cl. No. 487–59. Judgment for plaintiff, Dec. 14, 1961; no appeal.

Chargeability of Acreage Embraced in Oil and Gas Lease Offers, 71 I.D. 337 (1965), *Shell Oil Co.*, A–30575 (Oct. 31, 1966)

Shell Oil Co. v. *Udall*, Civil No. 216–67. Stipulation of dismissal filed Aug. 19, 1968.

Chemi-Cote Perlite Corp. v. *Arthur C. W. Bowen*, 72 I.D. 403 (1965)

Bowen v. *Chemi-Cote Perlite*, No. 2 CA–Civ. 248 Ariz. Ct. App. Decision against the Dept. by the lower court aff'd, 423 P. 2d 104 (1967); rev'd, 432 P. 2d 435 (1967).

Stephen H. Clarkson, 72 I.D. 138 (1965)

Stephen H. Clarkson v. *U.S.*, Cong. Ref. 5–68. Trial Commr's report adverse to U.S. issued Dec. 16, 1970; Chief Commr's report concurring with the Trial Commr's report issued Apr. 13, 1971. 85 Stat. 331, Aug. 11, 1971, enacted accepting the Chief Commr's report.

Appeals of COAC, Inc., 81 I.D. 700 (1974)

COAC, Inc. v. *U.S.* Ct. Cl. No. 395–75. Suit pending.

rs. Hannah Cohen, 70 I.D. 188 (1963)

Hannah and Abram Cohen v. *U.S.*, Civil No. 3158, D.R.I. Compromised.

rney R. Colson, 70 I.D. 409 (1963)

Barney R. Colson et al. v. *Stweart L. Udall*, Civil No. 63-26-Civ.-Oc. M.D. Fla. Dismissed with prejudice, 278 F. Supp. 826 (1968); aff'd, 428 F.2d 1046 (5th Cir. 1970); *cert. denied*, 401 U.S. 911 (1971).

lumbian Carbon Co., Merwin E. Liss, 63 I.D. 166 (1956)

Merwin E. Liss v. *Fred A. Seaton*, Civil No. 3233-56. Judgment for defendant, Jan. 9, 1958; appeal dismissed for want for prosecution, Sept. 18, 1958, D.C. Cir. No. 14,647.

peal by the Confederated Salish & Kootenai Tribes of the Flathead Reservation, in the Matter of the Enrollment of Mrs. Elverna Y. Clairmont Baciarelli, 77 I.D. 116 (1970)

Elverna Yeronne Clairmont Baciarelli v. *Rogers C. B. Morton*, Civil No. C-70-2200 SC, D. Cal. Judgment for defendant, Aug. 27, 1971; aff'd, 481 F. 2d 610 (9th Cir. 1973); no petition

peal of Continental Oil Co., 68 I.D. 337 (1961)

Continental Oil Co. v. *Stewart L. Udall et al.*, Civil No. 366-62. Judgment for defendant, Apr. 29, 1966; aff'd Feb. 10, 1967; *cert. den.*, 389 U.S. 839 (1967).

te of Hubert Franklin Cook, 5 IBIA 42; 83 I.D. 75 (1976)

Leroy V. & Roy H. Johnson, Marlene Johnson Exendine & Ruth Johnson Jones v. *Thomas S. Kleppe, Secretary of the Interior*, Civil No. CIV-76-0362-E, W.D. Okla. Suit pending.

ice C. Copeland, 69 I.D. 1 (1962)

See Leslie N. Baker *et al.*

Cord, Donald E. Wheeler, Edward D. Neuhoff, 80 I.D. 301 (1973)

Edward D. Neuhoff & E. L. Cord v. *Rogers C. B. Morton, Secretary of the nterior*, Civil No. R-2921, D. Nev. Dismissed, Sept. 12, 1975 (opinion); ff'd, July 17, 1978; no petition.

al of Cosmo Construction Co., 73 I.D. 229 (1966)

Cosmo Construction Co. et al. v. *U.S.*, Ct. Cl. 119-68. Ct. opinion setting se for trial on the merits issued Mar. 19, 1971.

& Co. Inc., 83 I.D. 409 (1976)

United Mine Workers of America v. *Thomas S. Kleppe*, No. 76-1980, nited States Ct. of Appeals, D.C. Cir. Suit pending.

Estate of Jonah Crosby (Deceased Wisconsin Winnebago Unallotted), 81 I.D. 279 (1974)

Robert Price v. *Rogers C. B. Morton, Individually & in his official capacity as Secretary of the Interior & his successors in office, et al.*, Civil No. 74–0–189, D. Neb. Remanded to the Secretary for further administrative action, Dec. 16, 1975.

John C. deArmas, Jr., P. A. McKenna, 63 I.D. 82 (1956)

Patrick A. McKenna v. *Clarence A. Davis*, Civil No. 2125–56. Judgment for defendant, June 20, 1957; aff'd, 259 F. 2d 780 (1958); *cert. denied*, 358 U.S. 835 (1958).

H. R. Delasco, 39 IBLA 194; 84 I.D. 192 (1979)
Blanche V. White, 40 IBLA 152; 85 I.D. 408 (1979)

Stewart Capital Corp. et al. v. *Cecil D. Andrus, Secretary of the Interior*, Civil No. C79–123, D. Wyo. Suit pending.

The Dredge Corp., 64 I.D. 368 (1957); 65 I.D. 336 (1958)

The Dredge Corp. v. *J. Russell Penny*, Civil No. 475, D. Nev. Judgment for defendant, Sept. 9, 1964; aff'd, 362 F.2d 889 (9th Cir. 1966); no petition. *See also, Dredge Co.* v. *Husite Co.*, 369 P. 2d 676 (1962); *cert. den.*, 371 U.S. 821 (1962).

Eastern Associated Coal Corp., 82 I.D. 22 (1975)

International Union of United Mine Workers of America v. *Rogers C. B. Morton, Secretary of the Interior*, No. 75–1107, United States Ct. of Appeals, D.C. Cir. Dismissed by stipulation, Oct. 29, 1975.

Eastern Associated Coal Corp., 82 I.D. 311 (1975)

United Mine Workers of America v. *Interior Board of Mine Operations Appeals*, No. 75–1727, United States Ct. of Appeals, D.C. Cir. Petition for Review withdrawn, July 28, 1975.

Eastern Associated Coal Corp., 82 I.D. 506 (1975), Reconsideration, 83 I.D. 425 (1976), Aff'd *en banc*, 83 I.D. 695 (1976), 7 IBMA 152 (1976)

United Mine Workers of America v. *Cecil D. Andrus*, No. 77–1030, United States Ct. of Appeals, D.C. Cir. Voluntary dismissal, Apr. 4, 1977.

Appeal of Eklutna, Inc., 1 ANCAB 165; 83 I.D. 500 (1976)

State of Alaska v. *Alaska Native Claims Appeal Board et al.*, Civil No. A76–236, D. Alaska. Suit pending.

David H. Evans v. *Ralph C. Little*, A–31044 (Apr. 10, 1970), 1 IBLA 269; 78 I.D. 47 (1971)

David H. Evans v. *Rogers C. B. Morton*, Civil No. 1–71–41, D. Idaho. Order granting motion of Ralph C. Little for leave to intervene as a party defendant issued June 5, 1972. Judgment for defendants, July 27, 1973; Aff'd, Mar. 12, 1975; no petition.

John J. Farrelly et al., 62 I.D. 1 (1955)

John J. Farrelly & The Fifty-One Oil Co. v. *Douglas McKay*, Civil No. 3037–55. Judgment for plaintiff, Oct. 11, 1955, no appeal.

Milton D. Feinberg, Benson J. Lamp, 37 IBLA 39; 85 I.D. 380 (1978); On *Reconsideration*, 40 IBLA 222; 86 I.D. 234 (1979)

Benson J. Lamp v. *Cecil Andrus, Secretary of the Interior, James L. Burski, Douglas E. Henriques & Edward W. Stuebing, Administrative Judges, IBLA*, Civil No. 79–1804. Suit pending.

Foote Mineral Co., 34 IBLA 285; 85 I.D. 171 (1978)

Foote Mineral Co. v. *Cecil D. Andrus, Individ. & as Secretary of the Interior, H. William Menard, Individ. & as Director, Geological Survey, & Murray T. Smith, Individ. & as Area Mining Supervisor, Geological Survey*, Civil No. LV–78–141 RDF, D. Nev. Dismissed without prejudice, Nov. 15, 1979, no appeal.

T. Jack Foster, 75 I.D. 81 (1968)

Gladys H. Foster, Executrix of the estate of T. Jack Foster v. *Stewart L. Udall, Boyd L. Rasmussen*, Civil No. 7611, D.N.M. Judgment for plaintiff, June 2, 1969; no appeal.

Franco Western Oil Co. et al., 65 I.D. 316, 427 (1958)

Raymond J. Hansen v. *Fred A. Seaton*, Civil No. 2810–59. Judgment for plaintiff, Aug. 2, 1960 (opinion); no appeal.

See Safarik v. *Udall*, 304 F. 2d 944 (1962); *cert. denied*, 371 U.S. 901 (1962).

Gabbs Exploration Co., 67 I.D. 160 (1960)

Gabbs Exploration Co. v. *Stewart L. Udall*, Civil No. 219–61. Judgment for defendant, Dec. 1, 1961; aff'd, 315 F. 2d 37 (1963); *cert. den.*, 375 U.S. 822 (1963).

Estate of Temens (Timens) Vivian Gardafee, 5 IBIA 113; 83 I.D. 216 (1976)

Confederated Tribes & Bands of the Yakima Indian Nation v. *Thomas Kleppe, Secretary of the Interior, & Erwin Ray*, Civil No. C–76–200, E.D. Wash. Suit pending.

Stanley Garthofner, Duvall Bros., 67 I.D. 4 (1960)

Stanley Garthofner v. *Stewart L. Udall*, Civil No. 4194–60. Judgment for plaintiff, Nov. 27, 1961; no appeal.

Estate of Gei-kaun-mah (Bert), 82 I.D. 408 (1975)

Juanita Geikaunmah Mammedaty & Imogene Geikaunmah Carter v. *Rogers C. B. Morton, Secretary of the Interior*, Civil No. CIV 75–1010–E, W.D. Okla. Judgment for defendant, 412 F. Supp. 283 (1973); no appeal.

General Excavating Co., 67 I.D 344 (1960)

General Excavating Co. v. *U.S.*, Ct. Cl. No. 170–62. Dismissed with prejudice Dec. 16, 1963.

Nelson A. Gerttula, 64 I.D. 225 (1957)

Nelson A. Gerttula v. *Stewart L. Udall*, Civil No. 685–60. Judgment for defendant, June 20, 1961; motion for rehearing denied, Aug. 3, 1961; aff'd 309 F. 2d 653 (1962); no petition.

Charles B. Gonsales et al., Western Oil Fields, Inc., et al., 69 I.D. 236 (1962)

Pan American Petroleum Corp. & Charles B. Gonsales v. *Stewart L. Udall*, Civil No. 5246, D.N.M. Judgment for defendant, June 4, 1964; aff'd, 352 F. 2d 32 (10th Cir. 1965); no petition.

James C. Goodwin, 80 I.D. 7 (1973)

James C. Goodwin v. *Dale R. Andrus, State Dir., Bureau of Land Management, Burton W. Silcock, Dir., Bureau of Land Management, & Rogers C. B. Morton, Secretary of the Interior*, Civil No. C–5105, D. Colo. Dismissed. Nov. 29, 1975 (opinion); appeal dismissed, Mar. 9, 1976.

Gulf Oil Corp., 69 I.D. 30 (1962)

Southwestern Petroleum Corp. v. *Stewart L. Udall*, Civil No. 2209–62. Judgment for defendant, Oct. 19, 1962; aff'd, 325 F. 2d 633 (1963); no petition.

Guthrie Electrical Construction, 62 I.D. 280 (1955), IBCA–22 (Supp.) (Mar. 30, 1956)

Guthrie Electrical Construction Co. v. *U.S.*, Ct. Cl. No. 129–58. Stipulation of settlement filed Sept. 11, 1958. Compromised offer accepted and case closed Oct. 10, 1958.

L. H. Hagood et al., 65 I.D. 405 (1958)

Edwin Still et al. v. *U.S.*, Civil No. 7897, D. Colo. Compromise accepted.

Raymond J. Hansen et al., 67 I.D. 362 (1960)

Raymond J. Hansen et al. v. *Stewart L. Udall*, Civil No. 3902–60. Judgment for defendant, June 23, 1961; aff'd, 304 F. 2d 944 (1962); *cert. den.*, 371 U.S. 901 (1962).

Robert Schulein v. *Stewart L. Udall*, Civil No. 4131–60. Judgment for defendant, June 23, 1961; aff'd, 304 F. 2d 944 (1962); no petition.

Billy K. Hatfield et al. v. *Southern Ohio Coal Co.*, 82 I.D. 289 (1975)

District 6 United Mine Workers of America et al. v. *U.S. Dept. of Interior Board of Mine Operations Appeals*, No.75–1704, U.S. Court of Appeals, D.C. Cir. Board's decision aff'd, 562 F. 2d 1260 (1977).

Jesse Higgins, Paul Gower & Willian Gipson v. *Old Ben Coal Corp.*, 81 I.D. 423 (1974)

Jesse Higgins et al. v. *Cecil D. Andrus*, No. 77–1363, United States Ct. of Appeals, D.C. Cir. Dismissed for lack of jurisdiction, June 20, 1977.

Kenneth Holt, an individual, etc., 68 I.D. 148 (1961)

Kenneth Holt, etc. v. *U.S.*, Ct. Cl. No. 162–62. Stipulated judgment, July 2, 1965.

Hope Natural Gas Co., 70 I.D. 228 (1963)

Hope Natural Gas Co. v. *Stewart L. Udall*, Civil No. 2132–63.

Consolidated Gas Supply Corp. v. *Stewart L. Udall et al.*, Civil No. 2109–63. Judgment for defendant, Sept. 20, 1965; Per curiam decision, aff'd, Apr. 28, 1966; no petition.

Boyd L. Hulse v. *William H. Griggs*, 67 I.D. 212 (1960)

William H. Griggs v. *Michael T. Solan*, Civil No. 3741, D. Idaho. Stipulation for dismissal filed May 15, 1962.

Idaho Desert Land Entries—Indian Hill Group, 72 I.D. 156 (1965), *U.S.* v. *Ollie Mae Shearman et al.—Idaho Desert Land Entries—Indian Hill Group*, 73 I.D. 386 (1966)

Wallace Reed et al. v. U.S., *Dept. of the Interior et al.*, Civil No. 1–65–86, D. Idaho. Order denying preliminary injunction, Sept. 3, 1965; dismissed, Nov. 10, 1965; amended complaint filed, Sept. 11, 1967.

U.S. v. *Raymond T. Michener et al.*, Civil No. 1–65–93, D. Idaho. Dismissed without prejudice, June 6, 1966.

U.S. v. *Hood Corp. et al.*, Civil No. 1–67–97, S.D. Idaho.

Civil Nos. 1–65–86 & 1–67–97 consolidated. Judgment adverse to U.S., July 10, 1970; reversed, 480 F. 2d 634 (9th Cir. 1973); *cert. denied*, 414 U.S. 1064 (1973). Dismissed with prejudice subject to the terms of the stipulation, Aug. 30, 1976.

*Appeal of Inter*Helo, Inc.*, IBCA-713-5-68 (Dec. 30, 1969), 82 I.D. 591 (1975)

John Billmeyer, etc. v. *U.S.*, Ct. Cl. No. 54-74. Remanded with instructions to admit evidence, May 30, 1975.

Interpretation of the Submerged Lands Act, 71 I.D. 20 (1964)

Floyd A. Wallis v. *Stewart L. Udall*, Civil No. 3089-63. Dismissed with prejudice, Mar. 27, 1968.

C. J. Iverson, 82 I.D. 386 (1975)

C. J. Iverson v. *Kent Frizzell, Acting Secretary of the Interior & Dorothy D. Rupe*, Civil No. 75-106-Blg., D. Mont. Stipulation for dismissal with prejudice, Sept. 10, 1976.

J. A. Terteling & Sons, 64 I.D. 466 (1957)

J. A. Terteling & Sons v. *U.S.*, Ct. Cl. No. 114-59. Judgment for defendant, 390 F. 2d 926 (1968); remaining aspects compromised.

J. D. Armstrong Co., 63 I.D. 289 (1956)

J. D. Armstrong, Inc. v. *U.S.*, Ct. Cl. No. 490-56. Plaintiff's motion to dismiss petition allowed, June 26, 1959.

M. G. Johnson, 78 I.D. 107 (1971), *U.S.* v. *Menzel G. Johnson*, 16 IBLA 234 (1974)

Menzel G. Johnson v. *Rogers C.B. Morton, Secretary of the Interior, et al.*, Civil No. CN-LV-158, RDF, D. Nev. Judgment for defendant, Oct. 18, 1977; appeal filed Dec. 5, 1977.

June Oil & Gas, Inc., Cook Oil & Gas, Inc., 41 IBLA 394; 86 I.D. 374 (1979)

June Oil & Gas, Inc. & Cook Oil & Gas, Inc. v. *Cecil D. Andrus, Secretary of the Interior, et al.*, Civil No. 79-1334 D. Colo. Suit pending.

Estate of San Pierre Kilkakham (Sam E. Hill), 1 IBIA 299; 79 I.D. 583 (1972), 4 IBIA 242 (1975), 5 IBIA 12 (1976)

Christine Sam & Nancy Judge v. *Thomas S. Kleppe, Secretary of the Interior*, Civil No. C-76-14, E.D. Wash. Dismissed with prejudice.

Anquita L. Kluenter et al., A-30483, Nov. 18, 1965

See Bobby Lee Moore et al.

Leo J. Kottas, Earl Lutzenhiser, 73 I.D. 123 (1966)

Earl M. Lutzenhiser and Leo Kottas v. *Stewart L. Udall et al.*, Civil No. 1371, D. Mont. Judgment for defendant, June 7, 1968; aff'd, 432 F. 2d 328 (9th Cir. 1970); no petition.

Max L. Krueger, Vaughan B. Connelly, 65 I.D. 185 (1958)

Max Krueger v. Fred A. Seaton, Civil No. 3106-58. Complaint dismissed by plaintiff, June 22, 1959.

W. Dalton La Rue, Sr., 69 I.D. 120 (1962)

W. Dalton La Rue, Sr. v. *Stewart L. Udall*, Civil No. 2784-62. Judgment for defendant, Mar. 6, 1963; aff'd, 324 F. 2d 428 (1963); *cert. den.*, 376 U.S. 907 (1964).

L. B. Samford, Inc., 74 I.D. 86 (1967)

L. B. Samford, Inc. v. *U.S.*, Ct. Cl. No. 393-67. Dismissed, 410 F. 2d 782 (1969); no petition.

Charles Lewellen, 70 I.D. 475 (1963)

Bernard E. Darling v. *Stewart L. Udall*, Civil No. 474-64. Judgment for defendant, Oct. 5, 1964; appeal voluntarily dismissed, Mar. 26 1965.

Administrative Appeal of Ruth Pinto Lewis v. *Superintendent of the Eastern Navajo Agency*, 4 IBIA 147; 82 I.D. 521 (1975)

Ruth Pinto Lewis, Individually & as the Administratrix of the Estate of Ignacio Pinto v. *Thomas S. Kleppe, Secretary of the Interior, & U.S.*, Civil No. CIV-76-223 M, D.N.M. Judgment for plaintiff, July 21, 1977; no appeal.

Milton H. Lichtenwalner et al., 69 I.D. 71 (1962)

Kenneth McGahan v. *Stewart L. Udall*, Civil No. A-21-63, D. Alaska. Dismissed on merits, Apr. 24, 1964; stipulated dismissal of appeal with prejudice, Oct. 5, 1964.

Merwin E. Liss et al., 70 I.D. 231 (1963)

Hope Natural Gas Co. v. *Stewart L. Udall*, Civil No.2132-63.

Consolidated Gas Supply Corp. v. *Stewart L. Udall et al.*, Civil No. 2100-63. Judgment for defendant, Sept. 20, 1965; per curiam dec., aff'd, Apr. 28 1966; no petition.

Bess May Lutey, 76 I.D. 37 (1969)

Bess May Lutey et al. v. *Dept. of Agriculture, BLM, et al.*, Civil No. 1817, D. Mont. Judgment for defendant, Dec. 10, 1970; no appeal.

Elgin A. McKenna Executrix, Estate of Patrick A. McKenna, 74 I.D. 133 (1967)

Mrs. Elgin A. McKenna as Executrix of the Estate of Patrick A. McKenna, Deceased v. *Udall*, Civil No. 2001-67. Judgment for defendant, Feb. 14, 1968; aff'd, 418 F. 2d 1171 (1969); no petition.

Mrs. Elgin A. McKenna, Widow and Successor in Interest of Patrick A. McKenna, Deceased v. *Walter J. Hickel, Secretary of the Interior, et al.*, Civil No. 2401, D. Ky. Dismissed with prejudice, May 11, 1970.

A. G. McKinnon, 62 I.D. 164 (1955)

A. G. McKinnon v. *U.S.*, Civil No 9433, D. Ore. Judgment for plaintiff 178 F. Supp. 913 (1959); rev'd, 289 F. 2d 908 (9th Cir. 1961).

Estate of Elizabeth C. Jensen McMaster, 5 IBIA 61; 83 I.D. 145 (1976)

Raymond C. McMaster v. *U.S. Dept. of the Interior, Secretary of the Interior & Bureau of Indian Affairs*, Civil No. C76-129T, W.D. Wash. Dismissed, June 29, 1978.

Wade McNeil et al., 64 I.D. 423 (1957)

Wade McNeil v. *Fred A. Seaton*, Civil No. 648-58. Judgment for defendant, June 5, 1959 (opinion); rev'd, 281 F. 2d 931 (1960); no petition.

Wade McNeil v. *Albert K. Leonard et al.*, Civil No. 2226, D. Mont. Dismissed, 199 F. Supp. 671 (1961); order, Apr. 16, 1962.

Wade McNeil v. *Stewart L. Udall*, Civil No. 678-62. Judgment for defendant, Dec. 13, 1963 (opinion); aff'd, 340 F. 2d 801 (1964); *cert. den.*, 381 U.S. 904 (1965).

Marathon Oil Co., 81 I.D. 447 (1974), *Atlantic Richfield Co., Marathon Oil Co.*, 81 I.D. 457 (1974)

Marathon Oil Co. v. *Rogers C. B. Morton, Secretary of the Interior, et. al.*, Civil No. C74-179, D. Wyo.

Marathon Oil Co. v. *Rogers C. B. Morton, Secretary of Interior, et al.*, Civil No. C 74-180, D. Wyo.

Atlantic Richfield Co. & Pasco, Inc. v. *Rogers C. B. Morton, Secretary of the Interior, et al.*, Civil No. C 74-181, D. Wyo.

Actions consolidated; judgment for plaintiff, 407 F. Supp. 1301 (1975); aff'd, 556 F. 2d 982 (10th Cir. 1977).

Salvatore Megna, Guardian, Philip T. Garigan, 65 I.D. 33 (1958)

Salvatore Megna, Guardian etc. v. *Fred A. Seaton*, Civil No. 468-58. Judgment for plaintiff, Nov. 16, 1959; motion for *reconsideration denied*, Dec. 2, 1959; no appeal.

Philip T. Garigan v. *Stewart L. Udall*, Civil No. 1577 Tux., D. Ariz. Preliminary injunction against defendant, July 27, 1966; supplemental dec. rendered Sept. 7, 1966; judgment for plaintiff, May 16, 1967; no appeal.

Meva Corp., 76 I.D. 205 (1969)

Meva Corp. v. *U.S.*, Cl. Ct. No 492-69. Judgment for plaintiff, 511 F. 2d 548 (1975).

Duncan Miller, Louise Cuccia, 66 I.D. 388 (1959)

Louise Cuccia & Shell Oil Co. v. *Stewart L. Udall*, Civil No. 562-60. Judgment for defendant, June 27, 1961; no appeal.

Duncan Miller, 70 I.D. 1 (1963)

Duncan Miller v. *Stewart L. Udall*, Civil No. 931–63. Dismissed for lack of prosecution, Apr. 21, 1966; no appeal.

Duncan Miller, Samuel W. McIntosh, 71 I.D. 121 (1964)

Samuel W. McIntosh v. *Stewart L. Udall*, Civil No. 1522–64. Judgment for defendant, June 29, 1965; no appeal.

Duncan Miller, A–30546 (Aug. 10, 1966), A–30566 (Aug. 11, 1966), and 73 I.D. 211 (1966)

Duncan Miller v. *Udall*, Civil No. C–167–66, D. Utah. Dismissed with prejudice, Apr. 17, 1967; no appeal.

Bobby Lee Moore et al., 72 I.D. 505 (1965); *Anquita L. Kluenter et al.*, A–30483 (Nov. 18, 1965)

Gary Carson Lewis, etc., et al. v. *General Services Administration et al.*, Civil No. 3253 S.D. Cal. Judgment for defendant, Apr. 12, 1965; aff'd, 377 F.2d 499 (9th Cir. 1967); no petition.

Henry S. Morgan et al., 65 I.D. 369 (1958)

Henry S. Morgan v. *Stewart L. Udall*, Civil No. 3248–59. Judgment for defendant, Feb. 20, 1961 (opinion); aff'd, 306 F. 2d 799 (1962); *cert. den.*, 371 U.S. 941 (1962).

Morrison-Knudsen Co., Inc., 64 I.D. 185 (1957)

Morrison-Knudsen Co. v. *U.S.*, Ct. Cl. No. 239–61. Remanded to Trial Comm'r, 345 F. 2d 833 (1965); Comm'r's report adverse to U.S. issued June 20, 1967; judgment for plaintiff, 397 F. 2d 826 (1968); part remanded to the Board of Contract Appeals; stipulated dismissal on Oct. 6, 1969, judgment for plaintiff, Feb. 17, 1970.

Glenn Munsey v. *Smitty Baker Coal Co., Ralph Baker, Smitty Baker, & P & P Coal Co.*, 84 I.D. 336 (1977)

Glenn Munsey v. *Cecil D. Andrus*, No. 77–1619, United States Ct. of Appeals, D.C. Cir. Suit pending.

Navajo Tribe of Indians v. *State of Utah*, 80 I.D. 441 (1973)

Navajo Tribe of Indians v. *Rogers C. B. Morton, Secretary of the Interior, Joan B. Thompson, Martin Ritvo & Frederick Fishman, members of the Board of Land Appeals, Dept. of the Interior*, Civil No. C–308–73. D. Utah. Dismissed with prejudice, Jan. 4. 1979.

Richard L. Oelschlaeger, 67 I.D. 237 (1960)

Richard L. Oelschlaeger v. *Stewart L. Udall*, Civil No. 4181–60. Dismissed, Nov. 15, 1963; case reinstated, Feb. 19, 1964; remanded, Apr. 4, 1967; rev'd & remanded with directions to enter judgment for appellant, 389 F. 2d 974 (1968); *cert. den.* 392 U.S. 909 (1968).

Oil and Gas Leasing on Lands Withdrawn by Executive Orders for Indian Purposes in Alaska, 70 I.D. 166 (1963)

Mrs. Louise A Pease v. *Stewart L. Udall*, Civil No. 760-63, D. Alaska. Withdrawn, Apr. 18, 1963.

Superior Oil Co. v. *Robert L. Bennett*, Civil No. A-17-63, D. Alaska. Dismissed, Apr. 23, 1963.

Native Village of Tyonek v. *Robert L. Bennett*, Civil No. A-15-63, D. Alaska. Dismissed, Oct. 11, 1963.

Mrs. Louise A. Pease v. *Stewart L. Udall*, Civil No. A-20-63, D. Alaska. Dismissed, Oct. 29, 1963 (oral opinion); aff'd, 332 F. 2d 62 (9th Cir. 1964); no petition.

George L. Gucker v. *Stewart L. Udall*, Civil No. A-39-63. D. Alaska. Dismissed without prejudice, Mar. 2, 1964; no appeal.

Oil Resources, Inc., 28 IBLA 394; 84 I.D. 91 (1977)

Oil Resources, Inc. v. *Cecil D. Andrus, Secretary of the Interior*, Civil No. C-77-0147, D. Utah. Suit pending.

Old Ben Coal Corp., 81 I.D. 428, 436, 440 (1974)

Old Ben Coal Corp. v. *Interior Board of Mine Operations Appeals et al.*, Nos. 74-1654, 74-1655, 74-1656, United States Court of Appeals for the 7th Cir. Board's decision aff'd, June 13, 1975; *reconsideration denied*, June 27, 1975.

Old Ben Coal Co., 82 I.D. 355 (1975)

United Mine Workers of America v. *U.S. Interior Board of Mine Operations Appeals*, No. 75-1852, United States Court of Appeals, D.C. Cir. Vacated & remanded with instructions to dismiss as moot, June 10, 1977.

Old Ben Coal Co., 84 I.D. 459 (1977)

United Mine Workers of America v. *Cecil D. Andrus*, No. 77-1840, United States Ct. of Appeals, D.C. Cir. Suit pending.

Appeal of Ounalashka Corp., 1 ANCAB 104; 83 I.D. 475 (1976)

Ounalaska Corp., for & on behalf of its Shareholders v. *Thomas Kleppe, Secretary of Interior, & his successor & predecessors in office, et al.*, Civil No. A76-241 CIV, D. Alaska. Suit pending.

Jack W. Parks v. *L & M Coal Corp.*, 83 I.D. 710 (1976)

Jack W. Parks v. *Thomas S. Kleppe*, No. 76-2052. United States Ct. of Appeals, D.C. Cir. Voluntary dismissal, May 4, 1977.

Paul Jarvis, Inc., 64 I.D. 285 (1957)

Paul Jarvis, Inc. v. *U.S.*, Ct. Cl. No. 40-58. Stipulated judgment for plaintiff, Dec. 19, 1958.

Peter Kiewit Sons' Co., 72 I.D. 415 (1965)

Peter Kiewit Sons' Co. v. *U.S.*, Ct. Cl. 129–66. Judgment for plaintiff, May 24, 1968.

Curtis D. Peters, 80 I.D. 595 (1973)

Curtis D. Peters v. *U.S., Rogers C. B. Morton, as Secretary of the Interior.* Civil No. C–75–0201 RFP, N.D. Cal. Judgment for defendant, Dec. 1, 1975; no appeal.

City of Phoenix v. *Alvin B. Reeves et al.*, 81 I.D. 65 (1974)

Alvin B. Reeves, Genevieve C. Rippey, Leroy Reeves & Thelma Reeves, as heirs of A. H. Reeves, Deceased v. *Rogers C. B. Morton, Secretary of the Interior, & The City of Phoenix, a municipal Corp.*, Civil No. 74–117 PHX–WPC, D. Ariz. Dismissed with prejudice, Aug. 9, 1974; *reconsideration den.*, Sept. 24, 1974; no appeal.

Harold Ladd Pierce, 69 I.D. 14 (1962)

Duncan Miller v. *Stewart L. Udall*, Civil No. 1351–62. Judgment for defendant, Aug. 2, 1962; aff'd, 317 F. 2d 573 (1963); no petition.

Pocahontas Fuel Co., 83 I.D. 690 (1976)

Howard Mullins v. *Cecil D. Andrus*, No. 77–1087. United States Ct. of Appeals, D.C. Cir. Suit pending.

Pocahontas Fuel Co., 84 I.D. 489 (1977)

Pocahontas Fuel Co., Div. of Consolidation Coal Co. v. *Cecil D. Andrus* No. 77–2239, United States Ct. of Appeals, 4th Cir. Suit pending.

Port Blakely Mill Co., 71 I.D. 217 (1964)

Port Blakely Mill Co. v. *U.S.*, Civil No. 6205, W.D. Wash. Dismissed with prejudice, Dec. 7, 1964.

Estate of John S. Ramsey (Wap Tose Note) (Nez Perce Allottee No. 853, Deceased), 81 I.D. 298 (1974)

Clara Ramsey Scott v. *U.S. & Rogers C. B. Morton, Secretary of the Interior, et al.*, Civil No. 3–74–39. D. Idaho. Dismissed with prejudice, Aug. 11, 1975; no appeal.

Ray D. Bolander Co., 72 I.D. 449 (1965)

Ray D. Bolander Co. v. *U.S.*, Ct. Cl. 51–56. Judgment for plaintiff, Dec. 13, 1968: subsequent Contract Officer's dec., Dec. 3, 1969; interim dec., Dec. 2, 1969; Order to Stay Proceedings until Mar. 31, 1970; dismissed with prejudice, Aug. 3, 1970.

Estate of Crawford J. Reed (Unallotted Crow No. 6412), 1 IBIA 326; 79 I.D. 621 (1972)

George Reed, Sr. v. *Rogers C. B. Morton et al.*, Civil No. 1105, D. Mont. Dismissed, June 14, 1973; no appeal.

Reliable Coal Corp., 1 IBMA 97; 79 I.D. 139 (1972)

Reliable Coal Corp. v. *Rogers C. B. Morton, Secretary of the Interior, et al.*, No. 72–1477 United States Ct. of Appeals, 4th Cir. Board's decision aff'd, 478 F. 2d 257 (4th Cir. 1973).

Republic Steel Corp., 82 I.D. 607 (1975)

Republic Steel Corp. v. *Interior Board of Mine Operations Appeals*, No. 76–1041, United States Ct. of Appeals, D.C. Cir. Rev'd & remanded, Feb.22, 1978.

Richfield Oil Corp., 62 I.D. 269 (1955)

Richfield Oil Corp. v. *Fred A. Seaton*, Civil No. 3820–55. Dismissed without prejudice, Mar. 6, 1958; no appeal.

Hugh S. Ritter, Thomas M. Bunn, 72 I.D. 111 (1965), *Reconsideration denied* by letter decision dated June 23, 1967, by the Under Secretary.

Thomas M. Bunn v. *Stewart L. Udall*, Civil No. 2615-65. Remanded, June 28, 1966.

Estate of William Cecil Robedeaux, 1 IBIA 106, 87 I.D. 234 (1971); 2 IBIA 33, 80 I.D. 390 (1973)

Oneta Lamb Robedeaux et al. v. *Rogers C. B. Morton*, Civil No. 71–646, D. Okla. Dismissed, Jan. 11, 1973.

Houston Bus Hill v. *Rogers C. B. Morton*, Civil No. 72–376, W.D. Okla. Judgment for plaintiff, Oct. 29, 1973; amended judgment for plaintiff, Nov. 12, 1973; appeal dismissed, June 28, 1974.

Houston Bus Hill & Thurman S. Hurst v. *Rogers C. B. Morton, Secretary of the Interior*, Civil No. 73–528–B, W.D. Okla. Judgment for plaintiff, Apr. 30, 1975; corrected judgment, May 2, 1975; per curiam dec., vacated & remanded, Oct. 2, 1975; judgment for plaintiff, Dec. 1, 1975.

Estate of Clark Joseph Robinson, 7 IBIA 74; 85 I.D. 294 (1978)

Rene Robinson, by & through her Guardian Ad Litem, Nancy Clifford v. *Cecil Andrus, Secretary of the Interior, Gretchen Robinson, & Trixi Lynn Robinson Harris*, Civil No. CIV–78–5097, D.S.D. Suit pending.

Rosebud Coal Sales Co., 37 IBLA 251; 85 I. D. 396 (1978)

Rosebud Coal Sales Co. v. *Cecil D. Andrus, Secretary of the Interior, Frank Gregg, Director, Bureau of Land Management, & Maria B. Bohl, Chief, Land & Mining, Bureau of Land Management, Wyo.*, Civil No. C78–261, D. Wyo. Judgment for plaintiff, Oct. 17, 1979. No appeal.

Richard W. Rowe, Daniel Gaudiane, 82 I.D. 174 (1975)

Richard W. Rowe, Daniel Gaudiane v. *Stanley K. Hathaway, in his official capacity as Secretary of the Interior*, Civil No. 75–1152. Judgment for defendant, July 29, 1976.

San Carlos Mineral Strip, 69 I.D. 195 (1962)

James Houston Bowman v. *Stewart L. Udall*, Civil No. 105-63. Judgment for defendant, 243 F. Supp. 672 (1965); *aff'd, sub nom. S. Jack Hinton et al.* v. *Stewart L. Udall*, 364 F. 2d 676 (1966); *cert. denied*, 385 U.S. 878 (1966); supplemented by M-36767, Nov. 1, 1967.

Seal and Co., 68 I.D. 94 (1961)

Seal & Co. v. *U.S.*, Ct. Cl. 274-62. Judgment for plaintiff, Jan. 31, 1964; no appeal.

Administrative Appeal of Sessions, Inc. (*a Cal. Corp.*) v. *Vyola Olinger Ortner* (*Lessor*), *Lease No. PSL-33, Joseph Patrick Patencio* (*Lessor*), *Lease No. PSL-36, Larry Olinger* (*Lessor*), *Lease No. PSL-41*, 81 I.D. 651 (1974)

Sessions, Inc. v. *Rogers C. B. Morton, Secretary of the Interior, et al.*, Civil No. CV 74-3589 LTL, C.D. Cal. Dismissed with prejudice, Jan. 26, 1976.

Sessions, Inc. v. *Rogers C. B. Morton, Secretary of the Interior, et al.*, Civil No. CV 74-3591 MML, C.D. Cal. Dismissed with prejudice, Jan. 26, 1976.

Sessions, Inc. v. *Rogers C. B. Morton, Secretary of the Interior, et al.*, Civil No. CV 74-3590 FW, C.D. Cal. Dismissed with prejudice, Jan. 26, 1976.

Steve Shapiro v. *Bishop Coal Co.*, 83 I.D. 59 (1976)

Bishop Coal Co. v. *Thomas S. Kleppe*, No. 76-1368, United States Ct. of Appeals, 4th Cir. Suit pending.

Shell Oil Co., A-30575 (Oct. 31, 1966), *Chargeability of Acreage Embraced in Oil & Gas Lease Offers*, 71 I.D. 337 (1964)

Shell Oil Co. v. *Udall*, Civil No. 216-67. Stipulated dismissal Aug. 19, 1968.

Sinclair Oil & Gas Co., 75 I.D. 155 (1968)

Sinclair Oil & Gas Co. v. *Stewart L. Udall, Secretary of the Interior, et al.*, Civil No. 5277, D. Wyo. Judgment for defendent, *sub nom. Atlantic Richfield Co.* v. *Walter J. Hickel*, 303 F. Supp. 724 (1969); aff'd, 432 F. 2d 587 (10th Cir. 1970); no petition.

Charles T. Sink, 82 I.D. 535 (1975)

Charles T. Sink v. *Thomas S. Kleppe, Secretary of the Interior—Mining Enforcement & Safety Administration* (*MESA*), No. 75-1292, United States Ct. of Appeals for the 4th Cir. Vacated without prejudice to plaintiff's rights, 529 F. 2d 601 (4th Cir. 1975).

Southern Pacific Co., 76 I.D. 1 (1969)

Southern Pacific Co. v. *Walter J. Hickel, Secretary of the Interior*, Civil No. S-1274, D. Cal. Judgment for defendant, Dec. 2, 1970 (opinion); no appeal.

Southern Pacific Co., Louis G. Wedekind, 77 I.D. 177 (1970), 20 IBLA 365 (1975)

George C. Laden, Louis Wedekind, Mrs. Vern Lear, Mrs. Arda Fritz, & Helen Laden Wagner, heirs of George H. Wedekind, Deceased v. ***Rogers C. B. Morton, et al.***, Civil No. R–2858, D. Nev. On June 20, 1974, remanded for further agency proceedings as originally ordered in 77 I.D. 177; Dist. Ct. reserves jurisdiction; supplemental complaint filed, Aug. 1, 1975; judgment for defendant, Nov. 29, 1976; appeal filed Jan. 27, 1977.

Southwest Welding & Manufacturing Division, Yuba Consolidated Industries, Inc., 69 I.D. 173 (1962)

Southwest Welding v. ***U.S.***, Civil No. 68–1658–CC, C.D. Cal. Judgment for plaintiff, Jan. 14, 1970; appeal dismissed, Apr. 6, 1970.

Southwestern Petroleum Corp. et al., 71 I.D. 206 (1964)

Southwestern Petroleum Corp. v. ***Stewart L. Udall***, Civil No. 5773, D.N.M. Judgment for defendant, Mar. 8, 1965; aff'd, 361 F. 2d 650 (10th Cir. 1966); no petition.

Standard Oil Co. of California et al., 76 I.D. 271 (1969)

Standard Oil Co. of California v. ***Walter J. Hickel et al.***, Civil No. A–159–69, D. Alaska. Judgment for plaintiff, 317 F. Supp. 1192 (1970); aff'd, ***sub nom. Standard Oil Co. of Cal.*** v. ***Rogers C. B. Morton et al.***, 450 F. 2d 493 (9th Cir. 1971); no petition.

Standard Oil Co. of Texas, 71 I.D. 257 (1964)

California Oil Co. v. ***Secretary of the Interior***, Civil No. 5729, D.N.M. Judgment for plaintiff, Jan. 21, 1965; no appeal.

James K. Tallman, 68 I.D. 256 (1961)

James K. Tallman et al. v. ***Stewart L. Udall***, Civil No. 1852–62. Judgment for defendant, Nov. 1, 1962 (opinion); rev'd, 324 F. 2d 411 (1963); ***cert. granted***, 376 U.S. 961 (1964); Dist. Ct. aff'd, 380 U.S. 1 (1965); ***rehearing denied***, 380 U.S. 989 (1965).

Texaco, Inc., 75 I.D. 8 (1968)

Texaco, Inc., a Corp. v. ***Secretary of the Interior***, Civil No. 446–68. Judgment for plaintff, 295 F. Supp. 1297 (1969); aff'd, in part & remanded, 437 F. 2d 636 (1970); aff'd in part & remanded, July 19, 1972.

Texas Construction Co., 64 I.D. 97 (1957), *Reconsideration denied*, IBCA–73 (June 18, 1957)

Texas Construction Co. v. ***U.S.***, Ct. Cl. No. 224–58. Stipulated judgment for plaintiff, Dec. 14, 1961.

state of John Thomas, Deceased, Cayuse Allottee No. 223 & Estate of Joseph Thomas, Deceased, Umatilla Allottee No. 877, 64 I.D. 401 (1957)

Joe Hayes v. *Fred A. Seaton, Secretary of the Interior*, Civil No. 859–581. Judgment for defendant, Sept. 18, 1958; aff'd, 270 F. 2d 319 (1959); *cert. denied*, 364 U.S. 814 (1960); *rehearing denied*, 364 U.S. 906 (1960).

hor-Westcliffe Development, Inc., 70 I.D. 134 (1963)

Thor-Westcliffe Development, Inc. v. *Stewart L. Udall*, Civil No. 5343, D. N.M. Dismissed with prejudice, June 25, 1963.

e also:

Thor-Westcliffe Development, Inc. v. *Stewart L. Udall, et al.*, Civil No. 2406–61. Judgment for defendant, Mar. 22, 1962; aff'd, 314 F. 2d 257 (1963); *cert. denied*, 373 U.S. 951 (1963).

chard K. Todd et al., 68 I.D. 291 (1961)

Bert F. Duesing v. *Stewart L. Udall*, Civil No. 290–62. Judgment for defendant, July 17, 1962 (oral opinion); aff'd, 350 F. 2d 748 (1965); *cert. denied*, 383 U.S. 912 (1966).

Atwood et al. v. *Stewart L. Udall*, Civil Nos. 293–62—299–62, incl. Judgment for defendant, Aug. 2, 1962; aff'd, 350 F. 2d 748 (1965); no petition.

peal of Toke Cleaners, 81 I.D. 258 (1974)

Thom Properties, Inc. d/b/a Toke Cleaners & Launderers v. *U.S. Department of the Interior, Bureau of Indian Affairs*, Civil No. A3–74–99, D. N.D. Stipulation for dismissal & order dismissing case, June 16, 1975.

tate of Phillip Tooisgah, 4 IBIA 189; 82 I.D. 541 (1975)

Jonathan Morris & Velma Tooisgah v. *Thomas S. Kleppe, Secretary of the Interior*, Civil No. CIV–76–0037–D, W.D. Okla. Suit pending.

ion Oil Co. Bid on Tract 228, Brazos Area, Texas Offshore Sale, 75 I.D. 147 (1968), 76 I.D. 69 (1969)

The Superior Oil Co. et al. v. *Stewart L. Udall*, Civil No. 1521–68. Judgment for plaintiff, July 29, 1968, modified, July 31, 1968; aff'd, 409 F. 2d 1115 (1969); dismissed as moot, June 4, 1969; no petition.

ion Oil Co. of California, Ramon P. Colvert, 65 I.D. 245 (1958)

Union Oil Co. of California v. *Stewart L. Udall*, Civil No. 3042–58. Judgment for defendant, May 2, 1960 (opinion); aff'd, 289 F. 2d 790 (1961); no petition.

Union Oil Co. of California et al., 71 I.D. 169 (1964), 72 I.D. 313 (1965)

Penelope Chase Brown et al. v. *Stewart L. Udall*, Civil No. 9202, D. Colo. Judgment for plaintiff, 261 F. Supp. 954 (1966); aff'd 406 F. 2d 759 (10th Cir. 1969); *cert. granted*, 396 U.S. 817 (1969); rev'd & remanded, 400 U.S. 48 (1970); remanded to Dist. Ct., Mar. 12, 1971; judgment for plaintiff, 370 F. Supp. 108 (1973); vacated & remanded, Sept. 22, 1975; petition for rehearing *en banc* denied; *cert. denied*, June 21, 1976; remanded to the Dept. for further proceedings, Jan. 17, 1977.

Equity Oil Co. v. *Stewart L. Udall*, Civil No. 9462, D. Colo. Order to Close Files and Stay Proceedings, Mar. 25, 1967.

Gabbs Exploration Co. v. *Stewart L. Udall*, Civil No. 9464, D. Colo. Order to Close Files and Stay Proceedings, Mar. 25, 1967.

Harlan H. Hugg et al. v. *Stewart L. Udall*, Civil No. 9252, D. Colo. Order to close Files and Stay Proceedings, Mar. 25, 1967.

Barnette T. Napier et al. v. *Secretary of the Interior*, Civil No. 8691, D. Colo. Judgment for plaintiff, 261 F. Supp. 954 (1966); aff'd, 406 F. 2d 759 (10th Cir. 1969); *cert. granted*, 396 U.S. 817 (1969); rev'd & remanded, 400 U.S. 48 (1970); remanded to Dist. Ct., Mar. 12, 1971; judgment for plaintiff, 370 F. Supp. 108 (1973); vacated & remanded, Sept. 22, 1975; petition for rehearing *en banc* denied; *cert. denied*, June 21, 1976; remanded to the Dept. for further proceedings, Jan. 17, 1977.

John W. Savage v. *Stewart L. Udall*, Civil 9458, D. Colo. Order to Close Files and Stay Proceedings, Mar. 25, 1967.

The Oil Shale Corp. et al. v.. *Secretary of the Interior*, Civil No. 8680, D. Colo. Judgment for plaintiff, 261 F. Supp. 954 (1966); aff'd, 406 F. 2d 759 (10th Cir. 1969); *cert. granted*, 396 U.S. 817 (1969); rev'd & remanded, 400 U.S. 48 (1970); remanded to Dist. Ct., Mar. 12, 1971; judgment for plaintiff, 370 F. Supp. 108 (1973); vacated & remanded, Sept. 22, 1975; petition for rehearing *en banc* denied; *cert. denied*, June 21, 1976; remanded to the Dept. for further proceedings, Jan. 17, 1977.

The Oil Shale Corp. et al. v. *Stewart L. Udall*, Civil No. 9465, D. Colo. Order to Close Files & Stay Proceedings, Mar. 25, 1967.

Joseph B. Umpleby et al. v. *Stewart L. Udall*, Civil No. 8685, D. Colo. Judgment for plaintiff, 261 F. Supp. 954 (1966); aff'd, 406 F. 2d 759 (10th Cir. 1969); *cert. granted*, 396 U.S. 817 (1969); rev'd & remanded, 400 U.S. 48 (1970); remanded to Dist. Ct., Mar. 12, 1971; judgment for plaintiff, 370 F. Supp. 108 (1973); vacated & remanded, Sept. 22, 1975; petition for rehearing *en banc* denied; *cert. denied*, June 21, 1976; remanded to the Dept. for further proceedings, Jan. 17, 1977.

Union Oil Co. of California, a Corp. v. *Stewart L. Udall*, Civil No. 9461, D. Colo. Order to Close Files & Stay Proceedings, Mar. 25, 1967.

Union Oil Co. of California, 71 I.D. 287 (1964)

Union Oil Co. of California v. *Stewart L. Udall*, Civil No. 2595-64. Judgment for defendant, Dec. 27, 1965; no appeal.

nion Pacific R.R., 72 I.D. 76 (1965)

The State of Wyoming & Gulf Oil Corp. v. *Stewart L. Udall, etc.*, Civil No. 4913, D. Wyo. Dismissed with prejudice, 255 F. Supp. 481 (1966); aff'd, 379 F. 2d 635 (10th Cir. 1967); *cert. denied*, 389 U.S. 985 (1967).

nited Mine Workers of America v. *Inland Steel Co.*, 83 I.D. 87 (1976)

United Mine Workers of America v. *Thomas S. Kleppe*, No. 76–1377, United States Ct. of Appeals, 7th Cir. Board's decision aff'd, 561 F. 2d 1258 (7th Cir. 1977).

nited Mine Workers of America, Local Union No. 1993 v. *Consolidation Coal Co.*, 84 I.D. 254 (1977)

Local Union No. 1993, United Mine Workers of America v. *Cecil D. Andrus*, No. 77–1582, United States Ct. of Appeals, D.C. Cir. Suit pending.

S. v. *Alonzo A. Adams et al.*, 64 I.D. 221 (1957), A–27364 (July 1, 1957)

Alonzo A. Adams et al. v. *Paul B. Witmer et al.*, Civil No. 1222–57–Y, S.D. Cal. Complaint dismissed, Nov. 27, 1957 (opinion); rev'd & remanded, 271 F. 2d 29 (9th Cir. 1958); on rehearing, appeal dismissed as to Witmer; petition for rehearing by Berriman denied, 271 F. 2d 37 (9th Cir. 1959).

U.S. v. *Alonzo Adams*, Civil No. 187–60–WM, S.D. Cal. Judgment for plaintiff, Jan. 29, 1962 (opinion); judgment modified, 318 F. 2d 861 (9th Cir. 1963); no petition.

S. v. *E. A. & Esther Barrows*, 76 I.D. 299 (1969)

Esther Barrows, as an individual & as Executrix of the Last Will of E. A. Barrows, Deceased v. *Walter J. Hickel*, Civil No. 70–215–CC, C.D. Cal. Judgment for defendant, Apr. 20, 1970; aff'd, 447 F. 2d 80 (9th Cir. 1971).

S. v. *J. L. Block*, 80 I.D. 571 (1973)

J.L. Block v. *Rogers Morton, Secretary of the Interior*, Civil No. LV–74–9, BRT, D. Nev. Judgment for defendant, June 6, 1975; rev'd & remanded with instructions to remand to the Secretary of the Interior, Mar. 29, 1977; no petition.

S. v. *Lloyd W. Booth*, 76 I.D. 73 (1969)

Lloyd W. Booth v. *Walter J. Hickel*, Civil No. 42–69, D. Alaska. Judgment for defendant, June 30, 1970; no appeal.

S. v. *Alice A. & Carrie H. Boyle*, 76 I.D. 61, 318 (1969), *Reconsideration denied*, Jan. 22, 1970

Alice A. & Carrie H. Boyle v. *Rogers C. B. Morton, Secretary of the Interior.* Civil No. Civ–71–491 Phx WEC, D. Ariz. Judgment for plaintiff, May 4, 1972; rev'd & remanded, 519 F. 2d 551 (9th Cir. 1975); *cert. denied*, 423 U.S. 1033 (1975).

U.S. v. *R. W. Brubaker et al.*, A-30636 (July 24, 1968); 9 IBLA 281 80 I.D. 261 (1973)

R. W. Brubaker, a/k/a Ronald W. Brubaker, B. A. Brubaker, a/k/a Barbara A. Brubaker, & William J. Mann, a/k/a W. J. Mann v. *Rogers C. B Morton, Secretary of the Interior*, Civil No. 73-1228 EC, C.D. Cal. Dismisse with prejudice, Aug. 13, 1973; aff'd, 500 F. 2d 200 (9th Cir. 1974); no petition

U.S. v. *Henrietta & Andrew Julius Bunkowski*, 5 IBLA 102; 79 I.D 43 (1972)

Henrietta & Andrew Julius Bunkowski v. *Paul Applegate, District Manager, Bureau of Land Management, Thomas S. Kleppe, Secretary of the Interior, et al.*, Civil No. R-76-182-BRT, D. Nev. Suit pending.

U.S. v. *Ford M. Converse*, 72 I.D. 141 (1965)

Ford M. Converse v. *Stewart Udall*, Civil No. 65-581, D. Ore. Judgmen for defendant, 262 F. Supp. 583 (1966); aff'd, 399 F. 2d 616 (9th Cir. 1968) *cert. denied*, 393 U.S. 1025 (1969).

U.S. v. *Alvis F. Denison et al.*, 71 I.D. 144 (1964), 76 I.D. 233 (1963

Marie W. Denison, individually & as Executrix of the Estate of Alvis Denison, Deceased v. *Steward L. Udall*, Civil No. 963 D. Ariz. Remanded, 24 F. Supp. 942 (1965).

Leo E. Shoup v. *Stewart L. Udall*, Civil No. 5822-Phx., D. Ariz. Judgmen for defendant, Jan. 31, 1972.

Reid Smith v. *Stewart L. Udall, etc.*, Civil No. 1053, D. Ariz. Judgment fo defendant, Jan. 31, 1972; aff'd, Feb. 1, 1974; *cert. denied*, Oct. 15, 1974.

U.S. v. *Everett Foster et al.*, 65 I.D. 1 (1958)

Everett Foster et al. v. *Fred A. Seaton*, Civil No. 344-58. Judgment for defendants, Dec. 5, 1958 (opinion); aff'd, 271 F. 2d 836 (1959); no petitio

U.S. v. *Golden Grigg et al.*, 82 I.D. 123 (1975)

Golden T. Grigg, LeFawn Grigg, Fred Baines, Otis H. Willams, Kathry Williams, Lorell Taylor, Williams A. Anderson, Saragene Smith, Thomas Anderson, Bonnie Anderson, Charles L. Taylor, Darlene Baines, Luann Paul E. Hogg v. *U.S., Rogers C. B. Morton, Secretary of the Interior*, Civil N 1-75-75, D. Idaho. Judgment for defendant, Nov. 6, 1979.

U.S. v. *Henault Mining Co.*, 73 I.D. 184 (1966)

Henault Mining Co. v. *Harold Tysk, et al.*, Civil No. 634, D. Mont. Jud ment for plaintiff, 271 F. Supp. 474 (1967); rev'd & remanded for furth proceeding, 491 F. 2d 766 (9th Cir. 1969); *cert. denied*, 398 U.S. 950 (1970 Judgment for defendant, Oct. 6, 1970.

U.S. v. *Charles H. Henrikson et al.*, 70 I.D. 212 (1963)

Charles H. Henrikson et al. v. *Stewart L. Udall et al.*, Civil No. 41749, N. Cal. Judgment for defendant, 229 F. Supp. 510 (1964); aff'd, 350 F. 2d (9th Cir. 1965); *cert. denied*, 384 U.S. 940 (1966).

U.S. v. *Humboldt Placer Mining Co. & Del De Rosier*, 79 I.D. 709 (1972)

Humboldt Placer Mining Co. & Del De Rosier v. *Secretary of the Interior*, Civil No. S-2755, E.D. Cal. Dismissed with prejudice, June 12, 1974; aff'd, 549 F. 2d 622 (9th Cir. 1977); petition for cert. filed June 25, 1977.

U.S. v. *Ideal Cement Co.*, 5 IBLA 235, 79 I.D. 117 (1972)

Ideal Basic Industries, Inc., formerly known as Ideal Cement Co. v. *Rogers C. B. Morton*, Civil No. J–12–72, D. Alaska. Judgment for defendant, Feb. 25, 1974; motion to vacate judgment denied, May 6, 1974; aff'd, 542 F. 2d 1364 (9th Cir. 1976).

U.S. v. *Independent Quick Silver Co.*, 72 I.D. 367 (1965)

Independent Quick Silver Co., an Oregon Corp. v. *Stewart L. Udall*, Civil No. 65-590, D. Ore. Judgment for defendant, 262 F. Supp. 583 (1966); appeal dismissed.

U.S. v. *Richard Dean Lance*, 73 I.D. 218 (1966)

Richard Dean Lance v. *Stewart L. Udall et al.*, Civil No. 1864, D. Nev. Judgment for defendant, Jan. 23, 1968; no appeal.

U.S. v. *William A. McCall, Sr., The Dredge Corp., Estate of Olaf H. Nelson, Deceased, Small Tract Applicants Ass'n, Intervenor*, 78 I.D. 71 (1971)

William A. McCall, Sr., The Dredge Corp. & Olaf H. Nelson v. *John F. Boyles et al.*, Civil No. 74-68 (RDF), D. Nev. Judgment for defendant, June 8, 1976.

U.S. v. *William A. McCall, Sr., Estate of Olaf Henry Nelson, Deceased*, 7 IBLA 21; 79 I.D. 457 (1972)

William A. McCall, Sr. & the Estate of Olaf Henry Nelson, Deceased v. *John S. Boyles, District Manager, Bureau of Land Management, Thomas S. Kleppe, Secretary of Interior, et al.*, Civil No. LV–76–155 RDF, D. Nev. Judgment for defendant, Nov. 4, 1977; appeal filed.

U.S. v. *Kenneth McClarty*, 71 I.D. 331 (1964), 76 I.D. 193 (1969)

Kenneth McClarty v. *Stewart L. Udall et al.*, Civil No. 2116, E.D. Wash. Judgment for defendant, May 26, 1966; rev'd & remanded, 408 F. 2d 907 (9th Cir. 1969); remanded to the Secretary, May 7, 1969; vacated & remanded to Bureau of Land Management, Aug. 13, 1969.

U.S. v. *Charles Maher et al.*, 5 IBLA 209, 79 I.D. 109 (1972)

Charles Maher & L. Franklin Mader v. *Rogers C. B. Morton, Secretary of the Interior*, Civil No. 1–72–153, D. Idaho. Dismissed without prejudice Apr. 3, 1973.

U.S. v. *Mary A. Mattey*, 67 I.D. 63 (1960)

U.S. v. *Edison R. Nogueira et al.*, Civil No. 65-220-PH, C.D. Cal. Judgment for defendant, Nov. 16, 1966; Rev'd & remanded, 403 F. 2d 816 (1968); no petition.

U.S. v. *Frank & Wanita Melluzzo*, 76 I.D. 160 (1969), 32 IBLA 46 (1977)

Frank & Wanita Melluzzo v. *Rogers C.B. Morton*, Civil No. CIV 73-308 PHX CAM, D. Ariz. Judgment for defendant, June 19, 1974; aff'd in part, rev'd & remanded in part 534 F. 2d 860 (9th Cir. 1976); no petition.

Frank & Wanita Melluzzo v. *Cecil Andrus, Secretary of the Interior*, Civil No. CIV-79-282 PHX, CAM, D. Ariz. Judgment for defendant, May 20, 1980.

U.S. v. *Frank & Wanita Melluzzo et al.*, 76 I.D. 181 (1969), *Reconsideration*, 1 IBLA 37, 77 I.D. 172 (1970)

WJM Mining & Development Co. et al. v. *Rogers C.B. Morton*, Civil No. 70-679, D. Ariz. Judgment for defendant, Dec. 8, 1971; dismissed, Feb. 4, 1974.

U.S. v. *Mineral Ventures, Ltd.*, 80 I.D. 792 (1973)

Mineral Ventures, Ltd. v. *The Secretary of the Interior*, Civil No. 74-201, D. Ore. Judgment for defendant, July 10, 1975; vacated & remanded, May 3, 1977; modified amended judgment, Sept. 9, 1977.

U.S. v. *G. Patrick Morris et al.*, 82 I.D. 146 (1975)

G. Patrick Morris, Joan E. Roth, Elise L. Neeley, Lyle D. Roth, Vera M. Baltzor (formally Vera M. Noble), Charlene S. & George R. Baltzor, Juanita M. & Nellie Mae Morris, Milo & Peggy M. Axelsen, & Farm Development Corp. v. *U.S. & Rogers C. B. Morton, Secretary of the Interior*, Civil No. 1-75-74, D. Idaho. Aff'd in part, rev'd in part, Dec. 20, 1976; rev'd Nov. 16, 1978.

U.S. v. *New Jersey Zinc Co.*, 74 I.D. 191 (1967)

The New Jersey Zinc Corp., a Del. Corp. v. *Stewart L. Udall*, Civil No. 67-C-404, D. Colo. Dismissed with prejudice, Jan. 5, 1970.

U.S. v. *Lloyd O'Callaghan, Sr., et al.*, 79 I.D. 689 (1972), *U.S.* v. *Lloyd O'Callaghan, Sr.*, Contest No. R-04845 (July 7, 1975), 29 IBLA 333 (1977)

Lloyd O'Callaghan, Sr., Individually & as Executor of the Estate of Ross O'Callaghan v. *Rogers Morton et al.*, Civil No. 73-129-S, S.D. Cal. Aff'd in part & remanded, May 14, 1974. Judgment for defendant, May 16, 1978, aff'd, May 8, 1980.

U.S. v. *J. R. Osborne et al.*, 77 I.D. 83 (1970), 28 IBLA 13 (1976), Reconsideration denied by Order dated Jan. 4, 1977

J. R. Osborne, individually & on behalf of R. R. Borders et al. v. *Rogers C. B. Morton et al.*, Civil No. 1564, D. Nev. Judgment for defendant, Mar. 1, 1972; remanded to Dist. Ct. with directions to reassess Secretary's conclusion, Feb. 22, 1974; remanded to the Dept. with orders to re-examine the issues, Dec. 3, 1974.

Bradford Mining Corp., Successor of J. R. Osborne, agent for various persons v. *Cecil D. Andrus, Secretary of the Interior*, Civil No. LV–77–218, RDF. D. Nev. Suit pending.

U.S. v. *Pittsburgh Pacific Co.*, 30 IBLA 388; 84 I.D. 282 (1977)

Pittsburgh Pacific Co. v. *U.S., Dept. of the Interior, Cecil Andrus, Joseph W. Goss, Anne Poindexter Lewis, Martin Ritvo, State of South Dakota, Dept. of Environmental Protection & Allen Lockner*, Civil No. CIV 77–5055, W.D.S.D. Suit pending.

State of South Dakota v. *Cecil D. Andrus, Secretary of the Interior, et al.*, Civil No. CIV 77–5058, W.D.S.D. Dismissed, Dec. 26, 1978.

U.S. v. *E. V. Pressentin & Devisees of the H. S. Martin Estate*, 71 I.D. 447 (1964)

E. V. Pressentin, Fred J. Martin, Admin. of H. A. Martin Estate v. *Stewart L. Udall & Charles Stoddard*, Civil No. 1194–65. Judgment for defendant. Mar. 19, 1969; no appeal.

U.S. v. *Ollie Mae Shearman et al.*, 73 I.D. 386 (1966)
See Idaho Desert Land Entries—Indian Hill Group.

U.S. v. *C. F. Snyder et al.*, 72 I.D. 223 (1965)

Ruth Snyder, Adm'r (x) of the Estate of C. F. Snyder, Deceased, et al. v. *Stewart L. Udall*, Civil No. 66–C–131, D. Colo. Judgment for plaintiff, 267 F. Supp. 110 (1967); rev'd 405 F. 2d 1179 (10th Cir. 1968); *cert. denied*, 396 U.S. 819 1969).

U.S. v. *Southern Pacific Co.*, 77 I.D. 41 (1970)

Southern Pacific Co. et al. v. *Rogers C. B. Morton et al.*, Civil No. S–2155, E.D. Cal. Judgment for defendant, Nov. 20, 1974.

U.S. v. *Clarence T. & Mary D. Stevens*, 77 I.D. 97 (1970)

Clarence T. & Mary D. Stevens v. *Walter J. Hickel*, Civil No. 1–70–94, D. Idaho. Judgment for defendant, June 4, 1971.

U.S. v. *Elmer H. Swanson*, 81 I.D. 14 (1974), 34 IBLA 25 (1978)

Elmer H. Swanson v. *Rogers C. B. Morton, Secretary of the Interior*, Civil No. 4–74–10, D. Idaho. Dismissed without prejudice, Dec. 23, 1975, (opinion).

Elmer H. Swanson & Livingston Silver, Inc. v. *Cecil D. Andrus, Secretary of the Interior*, Civil No. CIV–78–4045, D. Idaho. Suit pending.

U.S. v. *Alfred N. Verrue*, 75 I.D. 300 (1968)

Alfred N. Verrue v. *U.S. et al.*, Civil No. 6898 Phx., D. Ariz. Rev'd & remanded, Dec. 29, 1970; aff'd, 457 F. 2d 1202 (9th Cir. 1971); no petition.

U.S. v. *Vernon O. & Ina C. White*, 72 I.D. 552 (1965)

Vernon O. & Ina C. White v. *Stewart L. Udall*, Civil No. 1-65-122, D. Idaho. Judgment for defendant, Jan. 6, 1967; aff'd, 404 F. 2d 334 (9th Cir. 1968); no petition.

U.S. v. *Frank Winegar et al.*, 81 I.D. 370 (1974)

Shell Oil Co. & D. A. Shale, Inc. v. *Rogers C. B. Morton, Secretary of the Interior*, Civil No. 74-F-739, D. Colo. Judgment for plaintiff, Jan. 17, 1977; aff'd, Jan. 25, 1979.

U.S. v. *Elodymae Zwang*, *U.S.* v. *Darrell Zwang*, 26 IBLA 41; 83 I.D. 280 (1976)

Darrell & Elodymae Zwang v. *Cecil D. Andrus, Secretary of the Interior*, Civil No. 77-1431 R. D. Cal. Judgment for plaintiff, Aug. 20, 1979.

U.S. v. *Merle I. Zweifel et al.*, 80 I.D. 323 (1973)

Merle I. Zweifel et al. v. *U.S.*, Civil No. C-5276, D. Colo. Dismissed without prejudice, Oct. 31, 1973.

Kenneth Roberts et al. v. *Rogers C. B. Morton & The Interior Board of Land Appeals*, Civil No. C-5308, D. Colo. Dismissed with prejudice, 389 F. Supp. 87 (1975); aff'd, 549 F. 2d 158 (10th Cir. 1977).

E. A. Vaughey, 63 I.D. 85 (1956)

E. A. Vaughey v. *Fred A. Seaton*, Civil No. 1744-56. Dismissed by stipulation, Apr. 18, 1957; no appeal.

Estate of Cecelia Smith Vergote (Borger), Morris A. (K.) Charles & Caroline J. Charles (Brendale), 5 IBIA 96; 83 I.D. 209 (1976)

Confederated Tribes & Bands of the Yakima Indian Nation v. *Thomas S. Kleppe, Secretary of the Interior & Phillip Brendale*, Civil No. C-76-199, E.D. Wash. Suit pending.

Estate of Florence Bluesky Vessell (Unallotted Lac Courte Oreilles Chippewa of Wisconsin), 1 IBIA 312, 79 I.D. 615 (1972)

Constance Jean Hollen Eskra v. *Rogers C. B. Morton et al.*, Civil No 72 C-428, D. Wis. Dismissed, 380 F. Supp. 205 (1974); rev'd, Sept. 29, 1975, no petition.

Burt A. Wackerli et al., 73 I.D. 280 (1966)

Burt & Lueva G. Wackerli et al. v. *Stewart L. Udall et al.*, Civil No. 1-66-92 D. Idaho. Amended complaint filed Mar. 17, 1971; judgment for plaintiff, Feb. 28, 1975.

Estate of Milward Wallace Ward, 82 I.D. 341 (1975)

Alfred Ward, Irene Ward Wise & Elizabeth Collins v. *Kent Frizzell, Acting Secretary of the Interior, et al.*, Civil No. C75–175, D. Wyo. Dismissed, Jan. 1, 1976.

Weardco Construction Corp., 64 I.D. 376 (1957)

Weardco Construction Corp. v. *U.S.*, Civil No. 278–59–PH, S.D. Cal. Judgment for plaintiff, Oct. 26, 1959; satisfaction of judgment entered Feb. 9, 1960.

Estate of Mary Ursula Rock Wellknown, 1 IBIA 83; 78 I.D. 179 (1971)

William T. Shaw, Jr. et al. v. *Rogers C. B. Morton et al.*, Civil No. 974, D. Mont. Dismissed, July 6, 1973 (opinion); no appeal.

Western Nuclear, Inc., 35 IBLA 146; 85 I.D. 129 (1978)

Western Nuclear, Inc., a Del. Corp., authorized & doing business in the State of Wyo. v. *Cecil Andrus, Secretary of the Interior, & U.S.*, Civil No, C78–129, D. Wyo. Suit pending.

Minnie E. Wharton, John W. Wharton, Ruth Wharton James, Carroll Wharton, Iris Wharton Bartyl, Marvin Wharton, Thomas Wharton, Betty Wharton Zink, Faye Wharton Pamperien, & Samuel Wharton, 4 IBLA 287; 79 I.D. 6 (1972)

U.S. & Rogers C. B. Morton, Secretary of The Interior v. *Minnie E. & John W. Wharton, Ruth Wharton James, Carroll Wharton, Iris Wharton Bartyl, Marvin Wharton, Thomas Wharton, Betty Wharton Zink, Faye Wharton Pamperien & Samuel Wharton*, Civil No. 70–106, D. Ore. Judgment for defendant, Feb. 26, 1973; *reconsideration denied*, June 4, 1973; rev'd & remanded, 514 F. 2d 406 (9th Cir. 1975); no petition.

Estate of Hiemstennie (Maggie) Whiz Abbott, 2 IBLA 53, 80 I.D. 617 (1973); 4 IBIA 12, 82 I.D. 169 (1975); *reconsideration denied*, 4 IBIA 79 (1975)

Doris Whiz Burkybile v. *Alvis Smith, Sr., as Guardian Ad Litem for Zelma, Vernon, Kenneth, Mona & Joseph Smith, Minors et al.*, Civil No. C–75–190, E.D. Wash. Judgment for defendant, Jan. 21, 1977; no appeal.

Frank Winegar, Shell Oil Co. & D. A. Shale, Inc., 74 I.D. 161 (1967)

Shell Oil Co. et al. v. *Udall et al.*, Civil No. 67–C–321, D. Colo. Judgment for plaintiff, Sept. 18, 1967; no appeal.

Appeal of Wisenak, Inc., 1 ANCAB 157; 83 I.D. 496 (1976)

Wisenak, Inc., an Alaska Corp. v. *Thomas S. Kleppe, Individually & as Secretary of the Interior & the U.S.*, Civil No. F76–38 Civ., D. Alaska. Remanded to Department for further proceedings, July 9, 1979.

Estate of Wook-Kah-Nah, Comanche Allottee No. 1927, 65 I.D. 436 (1958)

Thomas J. Huff, Adm. with will annexed of the Estate of **Wook-Kah-Nah**, *Deceased, Comanche Enrolled Restricted Indian No. 1927* v. *Jane Asenap, Wilfred Tabbytite, J. R. Graves, Examiner of Inheritance, Bureau of Indian Affairs, Dept. of the Interior & Earl R. Wiseman, District Dir. of Internal Revenue*, Civil No. 8281, W.D. Okla. Dismissed as to the Examiner of Inheritance; plaintiff dismissed suit without prejudice as to the other defendants.

Thomas J. Huff, Adm. with will annexed of the Estate of **Wook-Kah-Nah** v. *Stewart L. Udall*, Civil No. 2595-60. Judgment for defendant, June 5, 1962; remanded 312 F. 2d 358 (1962).

State of Wyoming, 27 IBLA 137; 83 I.D. 364 (1976)

State of Wyoming, Albert E. King, Comm'r of Public Lands v. *Cecil D. Andrus, Secretary of the Interior*, Civil No. C77-034K, D. Wyo. Judgment for defendant, Sept. 8, 1977; aff'd, July 18, 1979.

Zeigler Coal Co., 81 I.D. 729 (1974)

International Union of United Mine Workers of America v. *Stanley K. Hathaway, Secretary of the Interior*, No. 75-1003, United States Court of Appeals, D.C. Cir. Rev'd & remanded to the Board for further proceedings, 532 F. 2d 1403 (1976).

Zeigler Coal Co., 82 I.D. 36 (1975)

Zeigler Coal Co. v. *Kent Frizzell, Acting Secretary of the Interior*, No. 75-1139. United States Court of Appeals. D.C. Cir. Judgment for defendant, 536 F. 2d 398 (1976).

TABLE OF CASES CITED

Page

Accardi, U.S. *ex rel.* *v.* Shaughnessy, 347 U.S. 260 (1954) 194, 322
Adams *v.* U.S., 318 F.2d 861 (9th Cir. 1963) 634
Akers *v.* Morton, 499 F.2d 44 (9th Cir. 1974), *cert. denied,* 423 U.S. 831 (1975) 66,104
Alabama By-Products Corp., 1 IBSMA 239, 243, 86 I.D. 446, 448 (1979) 14, 308, 336, 436, 447, 575
Alaska Oil & Minerals Corp., 29 IBLA 224, 231, 84 I.D. 114, 118 (1977) 112, 500
Alaska Placer Co., 33 IBLA 187, 84 I.D. 990 (1977) 360
Alaska, State of & Seldovia Native Ass'n, Appeals of, 2 ANCAB 1, 84 I.D. 349, 369-370 (1977) 85, 281, 288, 368, 374
Alaska, State of, Appeal of, 3 ANCAB 196, 86 I.D. 225 (1979) 226, 562
Alexander; Orchard *v.*, 157 U.S. 372, 383 (1895) 269
Alexander; U.S. *v.*, 602 F.2d 1228 (5th Cir. 1979) 594
Allard; U.S. *v.*, 397 F. Supp. 429, 431 (D. Mont. 1975) 534
Alumet *v.* Andrus, 607 F.2d 911 (1979) 476
American Communications Comm. *v.* WOKO, 329 U.S. 223, 229 (1946) 577
American Farm Lines *v.* Black Ball Freight Service, 397 U.S. 532, 25 L. Ed. 2d 547 (90 S. Ct. 1288) 188
American Smelting & Refining Co., 39 L.D. 299 (1910) 540
Anderson; U.S. *v.*, 74 I.D. 292 (1967) 51
Andrus; Alumet *v.*, 607 F.2d 911 (1979) 476

Page

Andrus; Brick *v.*, Civ. No. 79-1766 (D.C. Cir., June 6, 1980) 470
Andrus; Charlestone Stone Products Co. *v.*, 553 F.2d 1209 (9th Cir. 1977), *rev'd in part on other grounds* 436 U.S. 604 (1978) 46, 639
Andrus; Copper Vally Machine Works, Inc. *v.*, 474 F. Supp. 189 (D.D.C. 1979) 302
Andrus; Council of the Southern Mountains, Inc. *v.*, Civ. No. 79–1521 (D.D.C. Mar. 31, 1980) 199
Andrus; Freese *v.*, Civ. 78-1314 (D. Idaho, filed Nov. 20,1978) 396
Andrus; Global Exploration & Development Corp. *v.*, Civ. No. 78-0642 (D.D.C. Aug. 14, 1978) 20
Andrus; Midland Coal Co. *v.*, No. 79–112 (C.D. Ill., Dec. 12, 1979) 575
Andrus; Moss *v.*, Civ. No. 78–1050 (10th Cir. Sept. 20, 1978) 467
Andrus; Shell Oil Co. *v.*, 591 F. 2d 397 (10th Cir. 1979) 539
Andrus *v.* Shell Oil Co., ___ U.S. ___ 64 L.Ed.2d 593 (1980) 536
Andrus *v.* Shell Oil Co., 48 U.S.L.W. 4603 (June 3, 1980) 260
Andrus; Star Coal Co. *v.*, No. 79–171–2 (S.D. Iowa, Feb. 13, 1980) 575
Andrus; Union Carbide Corp. *v.*, 9 ELR 20701 (S.D.W.Va. 1980) 248, 326
Andrus; Utah International Inc. *v.*, Civ. No. C77–0225 (D. Utah CD June 15, 1979) 20, 81

Page

Andrus; Virginia Surface Mining & Reclamation Ass'n, Inc. *v.*, 483 F. Supp. 425 (W.D. Va. 1980) 248

Andrus *v.* Virginia Surface Mining & Reclamation Ass'n, 48 U.S.L.W. 3601 (Mar. 18, 1980) 248

Andrus; Winkler *v.*, 594 F.2d 775 (10th Cir. 1979) 470

Appeal of Bristol Bay Native Corp., 4 ANCAB 222, 228, 87 I.D. 164, 167, (1980) 609

Appeal of Doyon, Ltd., 4 ANCAB 50, 86 I.D. 692 (1979) 346

Appeal of Eklutna, Inc., 1 ANCAB 190, 83 I.D. 619 (1976) 281

1 ANCAB 305, 84 I.D 105 (1977) 221

Appeal of Environmental Consultants, Inc., IBCA-1192-5-78 (June 29, 1979), 86 I.D. 349, 79-2 BCA par. 13, 937 185

Appeal of Kodiak Island Setnetters Ass'n, 3 ANCAB 1, 85 I.D. 200 (1978) 5

Appeal of L. M. Johnson, Inc., IBCA-1268-5-79 (Sept. 28, 1979), 86 I.D. 508, 79-2 BCA par. 14,070 185

Appeal of Marden Corp., ASBCA 8934 (1963), 1963 BCA par. 3938 184

Appeal of Ouzinkie Native Corp., 4 ANCAB 3, 86 I.D. 618 (1979) 371, 376

Appeal of Paug-Vik, Inc., Ltd., 3 ANCAB 49, 85 I.D. 229 (1978) 423, 492

Appeal of Seldovia Native Association, Inc., 1 ANCAB 65, 78, 83 I.D. 461 (1976) 424

Appeal of State of Alaska, 1 ANCAB 281, 83 I.D. 685 (1976) 287

3 ANCAB 196, 217, 86 I.D. 225, 234 (1979) 226, 562

Page

Appeal of Tanacross, Inc., 4 ANCAB 173, 87 I.D. 123 (1980) 484

Appeals of State of Alaska & Seldovia Native Assn, 2 ANCAB 1, 84 I.D. 349, 369-370 (1977) 85, 281, 288, 368, 374

Arundel Corp. *v.* U.S., 103 Ct. Cl. 688 (May 7, 1945), *cert. denied*, Oct. 15, 1945, *rehearing denied*, Nov. 13, 1945 59

Atlantic Richfield Co. *v.* Hickel, 432 F.2d 587, 592 (10th Cir. 1970) 276

Aubertin *v.* Colville Confederated Tribes, 446 F. Supp. 430 (E.D. Wash. 1978) 502

Auburn Gold & Mining Co.; Opie *v.*, 27 L.D. 230 (1899) 252

Babcock Box Co., *In re*, 200 F. Supp. 80 (D. Mass. 1961) 506

Ballard E. Spencer Trust, Inc. *v.* Morton, 554 F. 2d 1067 (10th Cir. 1976), *aff'g*, Ballard E. Spencer Trust, Inc., 18 IBLA 25 (1974) 112, 500

Bankline Oil Co.; Helvering *v.*, 303 U.S. 362 (1938) 664

Barrows *v.* Hickel, 447 F. 2d 80, 83 (9th Cir. 1971) 45, 389

Barton *v.* Morton, 498 F. 2d 288 (9th Cir. 1974) 634

Bateson-Cheves Construction Co., IBCA No. 670-9-67 (Oct. 8, 1968), 68-2-BCA 7289 97

Becker; Kennedy *v.*, 241 U.S. 556, 563 (1916) 532

Bender; Palmer *v.*, 287 U.S. 551 (1933) 663

Bergdal; U.S. *v.*, 74 I.D. 245, 249-52 (1967) 40, 637

Berklund; NRDC *v.*, 458 F. Supp. 925 (D.C.C. 1978), *aff'd*, Civ. No. 78-1757 (D.C. Cir. Nov. 9, 1979) 18, 80

Berklund; Natural Resources Defense Council, Inc. *v.*, 609 F.2d 553 (D.C. Cir. 1979) 302

Best; Duguid *v.*, 291 F. 2d 235 (9th Cir. 1961), *cert. denied* 372 U.S. 906 (1963) 636

Page

Best *v.* Humboldt Placer Mining Co., 371 U.S. 334 (1963) 633

Bethlehem Mines Corp., 2 IBSMA 215, 220, 87 I.D. 380, 383 (1980) 439, 446, 671

Bird *v.* McGuire, 216 Cal. App. 2d 702, 31 Cal. Rptr. 386 (1963) 307

Black Ball Freight Service; American Farm Lines *v.*, 397 U.S. 532, 25 L. Ed. 2d 547 (90 S. Ct. 1288) 188

Black Fox Mining & Development Corp., 2 IBSMA 110, 114, 87 I.D. 207, 209 (1980) 325

Blatchford, Carter, 53 I.D. 613 (1932) 353

Bledsoe *v.* U.S., 349 F.2d 605, 607 (10th Cir. 1965) 195

BLM Circular No. 672, 47 I.D. 437, 447 (1920) 300

Bohme; U.S. *v.* 48 IBLA 267, 87 I.D. 248 (1980) 536

Bohen, Fred & Mildred, 63 I.D. 65 (1956) 358

Bond *v.* U.S., 181 F. 613 (C.C. Or. 1910) 105

Booz, Allen & Hamilton, Inc., IBCA-1027-3-74 (Mar. 24, 1976), 83 I.D. 95, 76-1 BCA par. 11,787 8

Borden Co.; U.S. *v.*, 308 U.S. 188, 198-199 (1939) 550

Bowling *v.* U.S., 233 U.S. 528 (1914) 108

Breed *v.* Jones, 421 U.S. 519, 528 (1975) 248, 326

Brewster *v.* Lanyon Zinc Co., 140 F. 801, 814 (8th Cir. 1905) 628

Brick *v.* Andrus, Civ. No. 79-1766 (D.C. Cir. June 6, 1980) 470

Bristol Bay Native Corp., Appeal of, 4 ANCAB 222, 228, 87 I.D. 164, 167 (1980) 609

Brune *v.* McDonald, 75 P.2d 10, 13 (Or. 1938) 167

Bryan *v.* Itasca County, Minnesota, 426 U.S. 373 (1976) 108

Page

Bunkowski; U.S. *v.*, 5 IBIA 102, 79 I.D. 43 (1972) appeal pending, Bunkowski *v.* Applegate, Civ. No. R-76-182-BRT (D. Nev. filed, Sept. 22, 1976) 40

Bureau of Indian Affairs; Morongo Band of Mission Indians *v.*, 7 IBIA 299, 86 I.D. 680 (1979) 505

Burgess Mining & Construction Corp., 1 IBSMA 293, 86 I.D. 656 (1979) 385, 496, 591, 647

Butcher; County of Los Angeles *v.*, 155 Cal. App. 2d 744, 318 P.2d 838 (1957) 353

Butz; National Forest Preservation Group *v.*, 485 F.2d 408 (9th Cir. 1973) 33

CAB; City of Lawrence, Mass. *v.*, 343 F.2d 583, 587 (1st Cir. 1965) 426

Cabell *v.* Markham, 148 F.2d 737, 739 (2d Cir. 1945) 518

Cafeteria & Restaurant Workers Union, Local 475, AFL-CIO *v.* McElroy, 367 U.S. 886 (1961) 192

Califano; Simon *v.*, 593 F.2d 121 (9th Cir. 1979) 138

California Portland Cement Co., 40 IBLA 339 (1979), *appeal pending* sub nom., Rosebud *v.* Andrus, Civ. No. 79-160 (D. Wyo., filed June 6, 1979) 206

Calif.; U.S. *v.*, 322 U.S. 19, 40 (1947) 278
438 U.S. 646, 654 (1978) 636

Capoeman; Squire *v.*, 351 U.S. 1 (1956) 106

Cameron *v.* U.S., 252 U.S. 450 (1920) 42, 269, 394, 537, 633

Capital Fuels, Inc. 2 IBSMA 261, 87 I.D. 430 (1980) 578

Carbon Fuel Co., 1 IBSMA 253, 86 I.D. 483 (1979) 308, 336

Carlin *v.* Cassriel, 50 L.D. 383 (1924) 296

Carter; Ryan *v.*, 93 U.S. (3 Otto) 78 (1876) 141

Cassriel; Carlin *v.*, 50 L.D. 383 (1924) 296

Page

Castle *v.* Womble, 19 L.D. 455 (1894), *approved in* Chrisman *v.* Miller, 197 U.S. 313 (1905) -- 41, 389, 538, 633

CBN Corp. *v.* U.S., 364 F. 2d 393 (Ct. Cl. 1966) -------------- 664

Cedar Coal Co., 1 IBSMA 145, 86 I.D. 250 (1979) ----------- 422, 525, 575, 646

Cement Institute; Federal Trade Comm'n *v.*, U.S. 683 (1948) --- 445

Century Tool Co., Inc., GSBCA No. 3999 (Mar. 3, 1976), 76-1 BCA 11,850 --------------- 413

Cen-Vi-Ro of Texas, Inc., IBCA-718-5-68 & 755-12-68 (Feb. 7, 1973), 80 I.D. 29, 73-1 BCA par. 9903 ----------------- 232

Chambers; Heiligman *v.*, 388 P. 2d 144 (Okla. 1959) ---------- 592

Chapman *v.* Chapman, 118 Vt. 120, 100 A. 2d 584 (1953) ---- 307

Charles T. Parker Construction Co., IBCA-335 (Jan. 29, 1964), 71 I.D. 6, 10, 1964 BCA par. 4017 --------------------- 59

Charlestone Stone Products Co. *v.* Andrus, 553 F. 2d 1209 (9th Cir. 1977), *rev'd in part on other grounds* 436 U.S. 604 (1978) -- 46, 639

Cherokee Nation *v.* Georgia, 30 U.S. (5 Pet.) 1 (1831) --------- 194

Choctaw Nation *v.* U.S., 318 U.S. 423, 432 (1943) ------------- 527

Chrisman *v.* Miller, 197 U.S. 313 (1905) --------------- 41, 537, 633

City of Lawrence, Mass. *v.* CAB, 343 F. 2d 583, 587 (1st Cir. 1965) --------------------- 426

C & K Coal Co., 1 IBSMA 118, 86 I.D. 221 (1979) -------- 302, 644

Clark; Dewey *v.* 180 F. 2d 766 (D.C. Cir. 1950) ------------ 143

Clark; Rehart *v.*, 448 F. 2d 170 (1971) --------------------- 192

Claypool Construction Col, Inc., 1 IBSMA 259, 270-71, 86 I.D. 486-92 (1979) -------------- 169

Clayton; U.S. *v.*, 198 F. Supp. 18, 21 (W. D. La. 1961) --------- 426

Clear Gravel Enterprises *v.* Keil, 505 F. 2d 180 (9th Cir. 1974) -- 42

Page

Cole *v.* Ralph, 252 U.S. 286 (1920) -------------------- 633

Coleman; U.S. *v.*, 390 U.S. 599 (1968) ------- 41, 270, 389, 537, 633

Colville Confederated Tribes; Aubertin *v.*, 446 F. Supp. 430 (E.D. Wash. 1978) ----------- 502

Comm'r; Kirby Petroleum Co. *v.*, 326 U.S. 599, 604 (1946) ---- 664

Comm'r; Paragon Jewel Coal Co. *v.*, 380 U.S. 624, 635-36 (1965) - 663

Comm'r; *v.* Southwest Exploration Co., 350 U.S. 308, 314 (1956) -------------------- 663

Committee *v.* Val Vue Sewer Dist., 14 Wash. App. 838, 545 P. 2d 42 (1976) ------------- 354

Commonwealth Electric Co., IBCA-1048-11-74 (Sept. 30, 1977), 84 I.D. 867, 77-2 BCA par. 12,781 ---------------- 123

Community & Johnson Corp. *v.* U.S., 156 F. Supp. 440 (D.N.J. 1957) --------------------- 638

Concrete Construction Corp., IBCA-432 (Nov. 10, 1964), 71 I.D. 420, 65-1 BCA par. 4,520 - 59

Consolidated Mines & Smelting Co., Ltd.; U.S. *v.*, 455 F. 2d 432 (9th Cir. 1971) ------------- 142

Consolidation Coal Co., 1 IBSMA 273, 86 I.D. 523 (1979), *after remand*, 2 IBSMA 21, 87 I.D. 59 (1980) -------- 60, 432

Continental Oil Co., 68 I.D. 186 (1961) ------------------- 294

70 I.D. 473 (1963) ----------- 624

74 I.D. 229 (1967) ----------- 617

Converse *v.* Udall, 399 F. 2d 616 (9th Cir. 1968), *cert. denied*, 393 U.S. 1025 (1969) ------- 538, 633

Copper Valley Machine Works, Inc. *v.* Andrus, 474 F. Supp. 189 (D.D.C. 1979) ----------- 302

Couch *v.* Udall, 404 F. 2d 97 (10th Cir. 1968) ----------- 108, 515

Council of the Southern Mountains, Inc. *v.* Andrus, Civ. No. 79-1521 (D.D.C. Mar. 31, 1980) -------------------- 199

Page

- County of Los Angeles *v.* Butcher, 155 Cal. App. 2d 744, 318 P. 2d 838 (1957) ---------- 353
- County of Suffolk *v.* Secretary of the Interior, 562 F. 2d 1368 (2d Cir. 1977), *cert. denied*, 434 U.S. 1064, 98 S. Ct. 1238 (1978) ---------- 26
- Cravat Coal Co., 2 IBSMA 136, 87 I.D. 308 (1980) ---------- 523
  - 2 IBSMA 249, 87 I.D. 416 (1980) ---------- 434
- Critzer *v.* U.S. ___ Ct. Cl.___ (Apr. 18, 1979), 47 U.S.L.W. 2684 ---------- 106
- Crocker; U.S. *v.*, 60 I.D. 285 (1949) ---------- 40, 488
- Crystal Marble Quarries Co. *v.* Dantice, 41 L.D. 642 (1913) ---------- 540
- Cutler; U.S. *v.*, 37 F. Supp. 724 (D. Idaho 1941) ---------- 435
- Daly *v.* Volpe, 514 F. 2d 1106, 1109–10 (9th Cir. 1975) ---------- 33
- Daniel Brothers Coal Co., 2 IBSMA 45, 87 I.D. 138 (1980) ---------- 584
- Dantice: Crystal Marble Quarries Co. *v.*, 41 L.D. 642 (1913) ---------- 540
- Davis *v.* Rio Rancho Estates, Inc., 401 F. Supp. 1045 (S.D.N.Y. 1975) ---------- 354
- Dayton Mining Co., Inc. & Plateau Mining, Inc., 1 IBSMA 125, 86 I.D. 241 (1979) ---------- 10, 248, 432
- Deep South Broadcasting Co. *v.* F.C.C., 278 F. 2d 264 (D.C. Cir. 1960) ---------- 638
- Denison, *In re*, 39 F. 2d 662 (W.D. Okla. 1930) ---------- 503
- Denison; U.S. *v.*, 76 I.D. 233, 239 (1969) ---------- 538
- Determination of Heirs & Approval of Wills of Indians Except Members of the Five Civilized Tribes & the Osages, Regulations, May 31, 1935, 55 I.D. 263 (1935) ---------- 105
- Dewey *v.* Clark, 180 F. 2d 766 (D.C. Cir. 1950) ---------- 143
- Dickson; U.S. *v.*, 40 U.S. (15 Pet.) 141 (1841) ---------- 141

Page

- Dimaren *v.* Immigration and Naturalization Service, 398 F. Supp. 556, 559 (S.D.N.Y. 1974) ---------- 426
- District Court of the Sixteenth Judicial District of Montana; Fisher *v.*, 424 U.S. 382 (1976) ---------- 311
- Donnelly *v.* U.S., 228 U.S. 243, 259, 267 (1913) ---------- 268, 636
- Doyon, Ltd., Appeal of, 4 ANCAB 50, 86 I.D. 692 (1979) ---------- 346
- Dravo Corp. *v.* U.S., 594 F. 2d 842 (Ct Cl. 1979) ---------- 231
- Dredge Corp.; Palmer *v.*, 398 F. 2d 791 (9th Cir. 1968), *cert. denied*, 393 U.S. 1066 (1969) ---------- 389
- Drummond Coal Co., 2 IBSMA 96, 101, 87 I.D. 196, 198 (1980) ---------- 330, 349, 382, 443, 555, 671
  - 2 IBSMA 189, 87 I.D. 347 (1980) ---------- 382, 445, 556
- Duguid *v.* Best. 291 F. 2d 235 (9th Cir. 1961), *cert. denied* 372 U.S. 906 (1963) ---------- 636
- Eastern Band of Cherokee Indians *v.* North Carolina Wildlife Resources Commission, 588 F. 2d 75 (4th Cir. 1978) ---------- 530
- Eastover Mining Co., 2 IBSMA 5, 87 I.D. 9 (1980) ---------- 64, 326, 422
  - 2 IBSMA 70, 87 I.D. 172 (1980) ---------- 436
- Edwards; U.S. *v.*, 9 IBLA 197, 203 (1973), aff'd, Edwards *v.* Kleppe, 588 F. 2d 671 (9th Cir. 1978) ---------- 538
- Eklutna, Inc., Appeal of, 1 ANCAB 190, 83 I.D. 619 (1976) ---------- 281
  - 1 ANCAB 305, 84 I.D. 105 (1977) ---------- 221
- Ely *v.* Velde, 497 F. 2d 252 (4th Cir. 1974) ---------- 31
- Enevoldsen, H. J., 44 IBLA 70, 86 I.D. 643 (1979) ---------- 469, 498
- Environmental Consultants, Inc., Appeal of, IBCA-1192-5-78 (June 29, 1979), 86 I.D. 349, 79-2 BCA par. 13,937 ---------- 185
- E. P. Hinkel & Co., Inc. *v.* Manhattan Co., 506 F. 2d 201 (D.C. Cir. 1974) ---------- 143

Page

Estate of Humpy, Harold, 7 IBIA 118, 86 I.D. 213 (1979) 317

Estate of Quapaw, Louis Harvey, 4 IBIA 263, 82 I.D. 640 (1975) 515

Estate of Spotted Horse, Martin, Sr., 2 IBIA 265, 81 I.D. 227 (1974) 103, 108

Estate of Tooisgah, Phillip, 4 IBIA 189, 82 I.D. 541 (1975), *aff'd*, Tooisgah *v.* Kleppe, 418 F. Supp. 913 (W.D. Okla. 1976) 106

Estate of Walks With A Wolf, 65 I.D. 92 (1958) 316

F.C.C.; Deep South Broadcasting Co. *v.*, 278 F. 2d 264 (D.C. Cir. 1960) 638

Federal Oil Shale Co., 53 I.D. 213 (1930) 254

Federal Trade Comm. *v.* Cement Institute, 333 U.S. 683 (1948) 445

Filtrol Corp. *v.* U.S., 487 F. 2d 536 (Ct. Cl. 1973) 664

Fisher *v.* District Court of the Sixteenth Judicial District of Montana, 424 U.S. 382 (1976) 311

Food & Drug Admin.; Hess & Clark Division of Rhodia, Inc. *v.*, 495 F. 2d 975, 990 (D.C. Cir. 1974) 308

Foote Mineral Co., 34 IBLA 285, 85 I.D. 171 (1978) 112

Ford; Parrack *v.*, 68 Ariz. 205, 203 P. 2d 872 (1949) 584

42 Products, GSBCA Nos. 4534, 4562, 77-1 BCA par. 12,268 461

Foster *v.* Seaton, 271 F. 2d 836 (D.C. Cir. 1959) 42, 265, 538, 635

FPC *v.* Tuscarora Indian Nation, 362 U.S. 99, 120 (1960) 534

Freeman *v.* Summers, 42 L.D. 201 (1927) 536

Freese *v.* Andrus, Civ. 78-1314 (D. Idaho, filed Nov. 20, 1978) 396

Freese *v.* U.S., No. 334-78 (Ct. Cl., filed July 24, 1978) 396

Fryberg; U.S. *v.*, 622 F. 2d 1010 (9th Cir. 1980) 532

Fugate; Thompson *v.*, 347 F. Supp. 120 (E.D. Va. 1972) 30

Gay; Thomas *v.*, 169 U.S. 264, 271 (1898) 534

Page

General Land Office Circular No. 460, 44 L.D. 572 (1916) 264

Georgia; Cherokee Nation *v.*, 30 U.S. (5 Pet.) 1 (1831) 194

Georgia; Worchester *v.* 31 U.S. (6 Pet.) 515 (1832) 108, 194

Georgia Dept. of Transportation; Hall County Historical Soc. *v.*, 447 F. Supp. 741 (N.D. Ga. 1978) 30

Georgia Pacific Co.; U.S. *v.*, 421 F. 2d 92, 96 (9th Cir. 1970) 141

Girardier *v.* Webster College, 563 F. 2d 1267 (8th Cir. 1977) 505

Giwosky; U.S. *v.*, 349 F. Supp. 1200 (E.D. Wis. 1972) 354

G. L. Christian & Assoc. *v.* U.S., 312 F. 2d 418, 427, *rehearing denied*, 160 Ct. Cl. 58 (1963), *cert. denied*, 375 U.S. 954 (1963), *rehearing denied*, 376 U.S. 929 (1964) 192

Global Exploration & Development Corp. *v.* Andrus, Civ. No. 78-0642 (D.D.C. Aug. 14, 1978) 20

Gordon, Joseph Roosevelt; Trimble, Deta Mona & Jessie *v.*, 430 U.S. 762, 52 L.Ed. 2d 31, 97 S. Ct. 1459 (1977) 319

Grafton Coal Co., Inc., 2 IBSMA 316, 87 I.D. 521 (1980) 558

Grain Merchants of Indiana, Inc. *v.* Union Bank & Savings Co., 408 F. 2d 209 (7th Cir. 1969) 507

Greene Consol. Copper Co.; National Metal Co. *v.*, 11 Ariz. 108, 89 P. 535 (1907) 307

Greer; Shreeve *v.*, 65 Ariz. 35, 173 P. 2d 641 (1946) 354

Griggs, Brooks, 51 IBLA 232, 87 I.D. 612 (1980) 612

Grimaud; U.S. *v.*, 220 U.S. 506, 31 S. Ct. 480, 483, 55 L. Ed. 563 (1911) 426

G.T.S. Co., Inc., IBCA-1077-9-75 (Sept. 15, 1978), 85 I.D. 373, 78-2 BCA par. 13,424 217

Guzman; U.S. *v.*, 18 IBLA 109, 81 I.D. 685 (1974) 394

Halbert *v.* U.S., 283 U.S. 753 (1931) 513

Page

Hall County Historical Soc. *v.* Georgia Dept. of Transportation, 447 F. Supp. 741 (N.D. Ga. 1978) 30
Hallenbeck *v.* Kleppe, 590 F.2d 852 (10th Cir. 1979) 635
Hardly Able Coal Co., 2 IBSMA 332, 87 I.D. 557 (1980) 587
Harper, David W., 74 I.D. 141 (1967) 133
Harris, George W. (On rehearing), 53 I.D. 508 (1931) 296
Harris; Watch *v.*, 603 F.2d 310 (2d Cir. 1979) 33
Hartman *v.* Hartman, 11 Ill. App. 3d 524, 297 N.E.2d 199 (1973) 353
Health Systems Agency of Okla., Inc. *v.* Norman, 589 F.2d 486 (10th Cir. 1978) 188
Heffner; U.S. *v.*, 420 F.2d 809 (4th Cir. 1969) 194
Heiligman *v.* Chambers, 338 P.2d 144 (Okla. 1959) 592
Helvering *v.* Bankline Oil Co., 303 U.S. 362 (1938) 664
Helvering *v.* O'Donnell, 303 U.S. 370 (1938) 664
Helvering *v.* Mitchell, 303 U.S. 391, 398 (1938) 326
Hess & Clark Division of Rhodia, Inc. *v.* Food & Drug Admin., 495 F.2d 975, 990 (D.C. Cir. 1974) 308
Hibbs, M.R., 42 L.D. 408 (1913) 485
Hibi; U.S. Immigration & Naturalization Service *v.*, 414 U.S. 5 (1973) 138
Hickel; Atlantic Richfield Co. *v.*, 432 F.2d 587, 592 (10th Cir. 1970) 276
Hickel; Barrows *v.*, 447 F.2d 80, 83 (9th Cir. 1971) 45, 389
Hickel *v.* The Oil Shale Corp., 400 U.S. 48 (1970) 249
Hickel; Tooahnippah *v.*, 397 U.S. 598 (1970) 66, 105
Highway Products, Inc. *v.*, U.S. 208 Ct. Cl. 926, 943 (1976) 339
Hill; TVA *v.*, 437 U.S. 153, 172–184 (1978) 534

Page

Hodel; Sierra Club *v.*, 544 F.2d 1036 (9th Cir. 1976) 33
Hollowbreast; Northern Cheyenne Tribe *v.*, 425 U.S. 649, 660 (1976) 299
Holz *v.* Lyles, 280 Ala. 321, 195 So. 2d 897 (1967) 425
Hopkins *v.* U.S. 414 F. 2d 464 (9th Cir. 1969) 104
House *v.* U.S., 144 F. 2d 555, *cert. denied*, 323 U.S. 781 (1944) 106
Hughes *v.* Ochsner, 27 L.D. 396 (1898) 252
Humboldt Placer Mining Co.; Best *v.*, 371 U.S. 334 (1963) 633
Humboldt Placer Mining Co. *v.* Secretary of the Interior, 549 F. 2d 622 (9th Cir.), *cert. denied*, 434 U.S. 836 (1977) 42
Humpy, Harold, Estate of, 7 IBIA 118, 86 I.D. 213 (1979) 317
Hunter *v.* Morton, 529 F. 2d 645 (10th Cir. 1976) 15
Hy-yu-tse-mil-kin *v.* Smith, 194 U.S. 401 (1904) 150
Ickes *v.* Virginia-Colorado Development Corp., 295 U.S. 639 (1935) 254
Ideal Cement Co.; U.S. *v.*, 5 IBLA 235, 79 I.D. 117 (1972), *aff'd sub nom.* Ideal Basic Industries *v.*, Morton, 542 F. 2d 1364 (9th Cir. 1976) 41
Immigration and Naturalization Service; Dimaren *v.*, 398 F. Supp. 556, 559 (S.D.N.Y. 1974) 426
Ingall Shipbuilding Division, Litton Systems, Inc., ASBCA No. 17579 (Feb. 17, 1978), 78-1 BCA par. 13,038 244
In re Babcock Box Co., 200 F. Supp. 80 (D. Mass. 1961) 506
In re Denison, 38 F.2d 662 (W.D. Okla. 1930) 503
In re Minot Auto Co., 298 F. 853 (8th Cir. 1924) 505
In re Penn, 41 F.2d 257 (D. Okla. 1929) 503
In re Russie, 96 F. 609 (D. Or. 1899) 503

Page

In re Smith's Estate, 86 Cal. App. 2d 456, 195 P.2d 842 (1948) 315
In re Stineman, 155 F.2d 755 (3d Cir. 1946), *reversed on other grounds sub nom.*, United States National Bank *v.* Chase National Bank, 331 U.S. 28 (1947) 505
Instructions, 44 L.D. 359 (1915) 480
  44 L.D. 513 (1916) 480
  47 L.D. 548 (1920) 538
Integrity Management International Inc., ASBCA No. 18289 (Apr. 24, 1975), 75-1 BCA par. 11,235 *aff'd On Reconsideration*, 75-2 BCA par. 11,602 456
Interstate Commerce Comm'n; Piedmont & Northern Ry. Co. *v.*, 286 U.S. 299 (1932) 141
Iron Silver Mining Co.; U.S. *v.*, 128 U S. 673 (1888) 270
Irwin & Leighton *v.* U.S., 101 Ct. Cl. 455 (1944) 184
Isbell Construction Co.; U.S. *v.*, 4 IBLA 205,78 I.D. 385 (1971) 42
Island Creek Coal Co., 1 IBSMA 285, 290, 86 I.D. 623, 626 (1979) 209
  1 IBSMA 316, 86 I.D. 724 (1979) 385, 648
  2 IBSMA 125, 87 I.D. 304 (1980) 333, 558, 587
Itasca County, Minnesota; Bryan *v.*, 426 U.S. 373 (1976) 108
Jackson; Wilcox *v.*, 38 U.S. (13 Pet.) 498 (1839) 488, 606
Jakober *v.* Loew's Theatre, Etc., 107 R.I. 104, 265 A. 2d 429 (1970) 354
Jenkins; U.S. *v.*, 75 I.D. 312, 318 (1968) 538
Jim; U.S. *v.*, 409 U.S. 80 (1972) 194
Jones; Breed *v.*, 421 U.S. 519, 528 (1975) 248, 326
Jones *v.* Taunah, 186 F. 2d 445 (10th Cir. 1951), rev'd, Squire *v.* Capoeman, 351 U.S. 1 (1956) 106
J. W. Kelly & Co. *v.* State, 123 Tenn. 516, 132 S.W. 193, 201 (1910) 200

Page

Kagama; U.S. *v.*, 118 U.S. 375 (1886) 109
Kaiser Steel Corp., 2 IBSMA 158, 87 I.D. 324 (1980) 421, 433
Kalyton; McKay *v.*, 204 U.S. 458 (1907) 105
Karlen; Strucker's Bay Neighborhood Council, Inc *v.*, 48 L.W. 3433 (Jan. 8, 1980) 25
Keil; Clear Gravel Enterprises *v.*, 505 F. 2d 180 (9th Cir. 1974) 42
Kelly *v.* U.S. Department of the Interior, 339 F. Supp. 1095, 1101 (E.D. Calif. 1972) 427
Kennedy *v.* Becker, 241 U.S. 556, 563 (1916) 532
Kindred *v.* Union Pacific Railroad Co., 225 U.S. 582 (1912) 425
Kinsela, Grace, 74 I.D. 386 (1967) 133
Kirby Petroleum Co. *v.* Commissioner, 326 U.S. 599, 604 (1946) 664
Kleppe; Hallenbeck *v.*, 590 F. 2d 852 (10th Cir. 1979) 635
Kleppe; Shell Oil Co. *v.*, 426 F. Supp. 894 (D. Colo. 1977), *aff'd* 591 F.2d 597 (10th Cir. 1979) 260, 539
Kleppe; Shell Oil Co. *v.*, No. 74-F-739 (D. Colo. Jan 17, 1977) 261
Knight *v.* U.S. Land Ass'n., 142 U.S. 161 (1891) 636
Kodiak Island Setnetters Ass'n, Appeal of, 3 ANCAB 1, 85 I.D. 200 (1978) 5
Krueger *v.* Morton, 539 F. 2d 235 (D.C. Cir. 1976) 15
Krushnic, Emil L., 52 L.D. 282 (1927), *aff'd on rehearing*, 52 L.D. 295 (1928) 252
Lange *v.* Robinson, 148 F. 799 (9th Cir. 1906) 634
Lanyon Zinc Co., Brewster *v.*, 140 F. 801, 814 (8th Cir. 1905) 628
Lear Siegler, Inc., ASBCA No. 20040 (Jan. 31, 1979), 79-1 BCA par. 13,687 218

Page

Lee; U.S. *v.*, 106 U.S. 196, 220 (1882) 577

Little Sandy Coal Sales, 2 IBSMA 25, 30, 87 I.D. 61, 64 (1980) 422

L. M. Johnson, Inc., IBCA-1268-5-79 (Sept. 28, 1979), 86 I.D. 508, 79-2 BCA par. 14,069 185, 459

Loew's Theatre, Etc.; Jakober *v.*, 107 R.I. 104, 265 A. 2d 429 (1970) 354

Lowe *v.* Union Oil Co. of Calif., 487 F. 2d 477 (9th Cir. 1973), *cert. denied* 417 U.S. 931 (1974) 479

Lowey, Frederick W., Civ. No. 79-3314 (D.D.C. Dec. 7, 1979) 468

Lutz Co. (The), GSBCA No. 2173 (Dec. 15, 1967), 68-1 BCA 6762 413

Lyles; Holz *v.*, 280 Ala. 321, 195 So. 2d 897 (1967) 425

McCall; U.S. *v.*, 7 IBLA 21, 79 I.D. 457 (1972) 50

McClarty; U.S. *v.*, 17 IBLA 20, 81 I.D. 472 (1974) 41, 55

McDonald; Brune *v.*, 75 P. 2d 10, 13 (Or. 1938) 167

McElroy; Cafeteria & Restaurant Workers Union, Local 473 AFL-CIO *v.*, 367 U.S. 886 (1961) 192

McElvain; U.S. *v.*, 272 U.S. 633 (1926) 141

McGuire; Bird *v.*, 216 Cal. App. 2d 702, 31 Cal. Rptr. 386 (1963) 307

McKay *v.* Kalyton, 204 U.S. 458 (1907) 105

McKay *v.* Wahlenmaier, 226 F. 2d 35, 43 (D.C. Cir. 1955) 111, 322

Mancari; Morton *v.*, 417 U.S. 535, 549-551 (1974) 550

Manhattan Co.; E. P. Hinkel & Co., Inc., 506 F. 2d 201 (D.C. Cir. 1974) 143

arden Corp., Appeal of, ASBCA 8934 (1963), 1963 BCA par. 3938 184

Page

Markham; Cabell *v.*, 148 F. 2d 737, 739 (2d Cir. 1945) 518

Martinez; Santa Clara Pueblo *v.*, 436 U.S. 49 (1978) 510

Martinez *v.* Southern Ute Tribe of Southern Ute Reservation, 249 F. 2d 915 (10th Cir. 1957) 510

Mazurie; U.S. *v.*, 419 U.S. 544 (1975) 317, 510

McMann; United Air Lines *v.*, 434 U.S. 192, 199 (1977) 602

Menominee Tribe *v.* U.S., 391 U.S. 404, 412 (1968) 526

Michigan Land & Lumber Co. *v.* Rust, 168 U.S. 589, 593 (1897) 269

Mid-Continent Petroleum Corp.; Sauder *v.*, 292 U.S. 272, 281 (1934) 628

Midland Coal Co. *v.* Andrus, No. 79-112 (C.D. Ill., Dec. 21 1979) 575

Miller; Chrisman *v.*, 197 U.S. 313 (1905) 41, 537, 633

Miller *v.* U.S., 294 U.S. 435 439 (1935), *rehearing denied*, 294 U.S. 734 (1935) 18

Minnesota; S.R.A., Inc. *v.*, 327 U.S. 558, 66 S. Ct. 749, 90 L. Ed. 851 (1946) 354

Minot Auto Co., *In re*, 298 F. 853 (8th Cir. 1924) 505

Miss. Power & Light *v.* U.S. Nuclear Regulatory Comm., 601 F. 2d 223 (5th Cir. 1979), *cert. denied*, 100 S. Ct. 1066 (1980) 476

Mitchell; Helvering *v.*, 303 U.S. 391, 398 (1938) 326

Mitchell; U.S. *v.*,-U.S.—, 100 S. Ct. 1349 (1980) 514

Mobley; U.S. *v.*, 45 F. Supp. 407 (N.D. Calif. 1942) 54

Monsanto Chemical Co.; NLRB *v.*, 205 F. 2d 763 (8th Cir. 1953) 188

Montana Eastern Pipe Line Co., 55 I.D. 189, 191 (1935) 81

Page

Montgomery-Macri Co. & Western Line Construction Co., IBCA-59 & IBCA-72 (June 28, 1963), 70 I.D. 242, 1963 BCA par. 3,819 ------ 59

Moore, James, 1 IBSMA 216, 86 I.D. 369 (1979) ------ 385, 496, 582, 591, 647

Morongo Band of Mission Indians *v.* Bureau of Indian Affairs, 7 IBIA 299, 86 I.D. 680 (1979) ------ 505

Morton; Akers *v.*, 499 F. 2d 44 (9th Cir. 1974), *cert. denied*, 423 U.S. 831 (1975) ------ 66, 104

Morton; Ballard E. Spencer Trust, Inc. *v.*, 554 F. 2d 1067 (10th Cir. 1976), *aff'g*, Ballard E. Spencer Trust, Inc., 18 IBLA 25 (1974) ------ 112, 500

Morton; Barton *v.*, 498 F. 2d 288 (9th Cir. 1974) ------ 634

Morton; Hunter *v.*, 529 F. 2d 645 (10th Cir. 1976) ------ 15

Morton; Krueger *v.*, 539 F. 2d 235 (D.C. Cir. 1976) ------ 15

Morton *v.* Mancari, 417 U.S. 535, 549–551 (1974) ------ 550

Morton; Multiple Use, Inc. *v.*, 504 F. 2d 448 (9th Cir. 1974) ------ 634

Morton; NRDC *v.*, 458 F. 2d 827, 837–38 (1972) ------ 25

Morton; Oil Shale Corp. (The), 370 F. Supp. 108 (D. Colo. 1973) ------ 258

Morton *v.* Ruiz, 415 U.S. 199, 235 (1974) ------ 41

Morton; Union Oil Co. of Calif. *v.*, 512 F. 2d 743, 748, 751 (9th Cir. 1975) ------ 77, 600

Morton; Wilderness Society *v.*, 479 F. 2d 842, 856 (D.C. Cir.), *cert. denied*, 411 U.S. 917 (1973) ------ 295

Moss *v.* Andrus, Civ. No. 78–1050 (10th Cir. Sept. 20, (1978) ------ 467

M & P Equipment Co., IBCA–1088–11–75 (Sept. 28, 1979), 86 I.D. 527, 79–2 BCA par. 14,094 ------ 59

Page

Mullen *v.* Simmons, 234 U.S. 192 (1914) ------ 104

Multiple Use, Inc. *v.* Morton, 504 F. 2d 448 (9th Cir. 1974) ------ 634

Multnomah Co.; Reynolds Aluminum *v.*, 206 Or. 602, 287 P. 2d 921 (1955) ------ 354

Nat'l Forest Preservation Group *v.* Butz, 485 F. 2d 408 (9th Cir. (1973) ------ 33

Nat'l Metal Co. *v.* Greene Consol. Copper Co., 11 Ariz. 108, 89 P. 535 (1907) ------ 307

Nat'l Realty & Construction Co. *v.* OSHRC, 489 F. 2d 1257, 1264 (D.C. Cir. 1973) ------ 587

Natural Resources Defense Council, Inc. *v.* Berklund, 609 F. 2d 553 (D.C. Cir. 1979) ------ 302

New Brunswick *v.* U.S., 276 U.S. 547, 48 S. Ct. 371, 72 L.Ed. 693 (1928) ------ 354

Newhall *v.* Sanger, 92 U.S. 761 (1875) ------ 425

Nixon; U.S. *v.*, 418 U.S. 683, 696 (1974) ------ 322

NLRB *v.* Monsanto Chemical Co., 205 F. 2d 763 (8th Cir. 1953) ------ 188

NLRB *v.* Q–T Shoe Manufacturing Co., 409 F. 2d 1247, 1252 (3d Cir. 1969) ------ 427

NLRB *v.* Sharples Chemicals, Inc., 209 F. 2d 645 (6th Cir. 1954) ------ 639

NLRB; Universal Camera Corp. *v.*, 340 U.S. 474, 484–88 (1951) ------ 639

NLRB *v.* Wyman-Gordon Co., 89 S. Ct. 1426, 1429, 394 U.S. 759,22 L. Ed. 709 (1969) ------ 427

Noble; U.S. *v.*, 237 U.S. 74 (1915) ------ 108

Noland *v.* Wootan, 102 Ariz. 192, 427 P. 2d 143 (1967) ------ 171

Norman; Health Systems Agency of Okla., Inc. *v.* 589 F. 2d 486 (10th Cir. 1978) ------ 188

North American Coal Corp., 74 I.D. 209 (1967) ------ 499

Page

orth Carolina Wildlife Resources Comm.; Eastern Bank of Cherokee Indians *v.*, 588 F. 2d 75 (4th Cir. 1978) 530

orthern Cheyenne Tribe *v.* Hollowbreast, 425 U.S. 649, 660 (1976) 299

orton; Warr *v.*, 190 Okla. 144, 121 P. 2d 583, 584 (1942) 188

RDC *v.* Berklund, 458 F. Supp. 925 (D.C.C. 1978), *aff'd*, Civ. No. 78–1757 (D.C. Cir. Nov. 9, 1979) 18, 80

RDC *v.* Morton, 458 F.2d 827, 837–38 (1972) 25

RDC; Vermont Yankee Nuclear Power Corp. *v.*, 435 U.S. 519, 551 (1978), *citing* NRDC *v.* Morton, 458 F. 2d 827, 837–38 (1972) 25

chsner; Hughes *v.*, 27 L.D. 396 (1898) 252

Donnell; Helvering *v.*, 303 U.S. 370 (1938) 664

fe, Henry, 64 I.D. 52 (1957) 476

l Shale Corp. (The); Hickel *v.*, 400 U.S. 48 (1970) 249

l Shale Corp. (The) *v.* Morton, 370 F. Supp. 108 (D. Colo. 1973) 258

l Shale Corp. (The) *v.* Udall, 261 F. Supp. 954 (D. Colo. 1966) 256

l Shale Corp. (The); Udall *v.*, 406 F. 2d 759 (10th Cir. 1969) 257

la. Gas & Electric Co. *v.* U.S., 609 F. 2d 1365 (10th Cir. 1979) 108

land Construction Co., IBCA No. 871–9–70 (Mar. 23, 1971), 71–1 BCA par. 8766 117

l Ben Coal Co., 2 IBSMA 38, 87 I.D. 119 (1980) 306, 523, 587

Leary; U.S. *v.*, 63 I.D. 341 (1956) 259

phant *v.* Suquamish Indian Tribe, 435 U.S. 191, 206 (1978) 531

ie *v.* Auburn Gold & Mining Co., 29 L.D. 230 (1899) 252

chard *v.* Alexander, 157 U.S. 72, 383 (1895) 269

Page

Osburn; Roberts *v.*, 2 Kan. 90, 589 P.2d 985 (1979) 353

OSHRC; National Realty & Construction Co. *v.*, 489 F. 2d 1257, 1264 (D.C. Cir. 1973) 587

Ouzinkie Native Corp., Appeal of, 4 ANCAB 3, 86 I.D. 618 (1979) 371, 376

Pack, D. E., 30 IBLA 166, 84 I.D. 192 (1977) 468

Palmer *v.* Bender, 287 U.S. 551 (1933) 663

Palmer *v.* Dredge Corp., 398 F. 2d 791 (9th Cir. 1968), *cert. denied*, 393 U.S. 1066 (1969) 389

Paragon Jewel Coal Co. *v.* Comm'r, 380 U.S. 624, 635–36 (1965) 663

Parrack *v.* Ford, 68 Ariz. 205, 203 P.2d 872 (1949) 584

Parsons *v.* Smith, 359 U.S. 215 (1959) 663

Patrick, Dennis R., 1 IBSMA 158, 86 I.D. 266 (1979) 446, 582

Paug-Vik, Inc., Ltd., Appeal of, 3 ANCAB 49, 85 I.D. 229 (1978) 423, 492

Payne; U.S. *v.*, 264 U.S. 446 (1924) 513, 527

Penn, *In re*, 41 F.2d 257 (D. Okla. 1929) 503

Perales; Richardson *v.*, 402 U.S. 389 (1971) 445

Piedmont & Northern Ry. Co. *v.* Interstate Commerce Comm'n, 286 U.S. 299 (1932) 141

Portland Area Director; Whatcom County Park Board *v.*, 6 IBIA 196, 84 I.D. 938 (1977) 195

Pringle; Rickard *v.*, 293 F. Supp. 981, 984 (E.D.N.Y. 1968) 600

Puyallup Tribe *v.* Washington Game Department, 391 U.S. 392, 398 (1968) 528

Puyallup Tribe; Washington Game Dept. *v.*, 414 U.S. 44, 48 (1973) 528

Puyallup Tribe *v.* Washington Game Department, 433 U.S. 165, 171, 176 (1977) 528

Page

Q-T Shoe Manufacturing Co.; NLRB *v.*, 409 F. 2d 1247, 1252 (3d Cir. 1969) 427
Quapaw, Louis Harvey, Estate of, 4 IBIA 263, 82 I.D. 640 (1975) 515
Radionics, Inc., ASBCA No. 20796 (Feb. 28, 1977), 77-1 par. 12,448 456
Ralph; Cole *v.*, 252 U.S. 286 (1920) 633
Rawls *v.* Secretary of the Interior, 460 F. 2d 1200 (9th Cir. 1972) 397
Rawson *v.* U.S., 225 F. 2d 855 (9th Cir. 1955) 41
Ray; U.S. *v.*, 423 F. 2d 16 (5th Cir. 1970) 594
Reay, Frances R. (Lessee), 60 I.D. 366 (1949) 299
Rehart *v.* Clark, 448 F. 2d 170 (1971) 192
Reynolds Aluminum *v.* Multnomah Co., 206 Or. 602, 287 P. 2d 921 (1955) 354
Richardson *v.* Perales, 402 U.S. 389 (1971) 445
Rickard *v.* Pringle, 293 F. Supp. 981, 984 (E.D.N.Y. 1968) 600
Rio Rancho Estates, Inc.; Davis *v.*, 401 F. Supp. 1045 (S.D.N.Y. 1975) 354
Roberts *v.* Osburn, 2 Kan. 90, 589 P. 2d 985 (1979) 353
Robinson; Lange *v.*, 148 F. 799 (9th Cir. 1906) 634
Rolfe, Rodney, 25 IBLA 331, 83 I.D. 269 (1976) 112
Rosenberg *v.* Rudnick, 262 F. Supp. 635 (D. Mass. 1967) 506
Ruby Co., 72 I.D. 189 (1965) 499
Ruby Co.; U.S. *v.*, 588 F. 2d 697, 703-04 (9th Cir. 1978) 138, 142
Rudnick; Rosenberg *v.*, 262 F. Supp. 635 (D. Mass. 1967) 506
Ruiz; Morton *v.*, 415 U.S. 199, 235 (1974) 41
Running Horse *v.* Udall, 211 F. Supp. 586 (D.D.C. 1962) 103, 106
Rural Electrification Admin.; Weintraub *v.*, 457 F. Supp. 78 (M.D. Pa. 1978) 31

Page

Russell; U.S. *v.*, 40 IBLA 309 (1979), *aff'd sub nom.* Russell *v.* Peterson, Civ. No. 79-949 (D. Or., June 23, 1980) 635
Russie, *In re*, 96 F. 609 (D. Or. 1899) 503
Rust; Michigan Land & Lumber Co. *v.*, 168 U.S. 589, 593 (1897) 269
Rutledge *v.* U.S., 428 F. 2d 347, 351 (5th Cir. 1970) 663
Ryan *v.* Carter, 93 U.S. (3 Otto) 78 (1876) 141
Sanger; Newhall *v.*, 92 U.S. 761 (1875) 425
Santa Clara Pueblo *v.* Martinez, 436 U.S. 49 (1978) 510
Sauder *v.* Mid-Continent Petroleum Corp., 292 U.S. 272, 281 (1934) 628
Schaub *v.* U.S., 207 F. 2d 325 (9th Cir. 1953) 41
Schaub; U.S. *v.*, 103 F. Supp. 873 (D.C. Alaska 1952), *aff'd*, 207 F. 2d 325 (9th Cir. 1953) 489
Schunk, A. W., 16 IBLA 191, 81 I.D. 401 (1974) 41, 54
Seaton; Foster *v.*, 271 F. 2d 836 (D.C. Cir. 1959) 42, 265, 538, 635
Seaton; Vitarelli *v.*, 359 U.S. 535 (1959) 322
Secretary of the Interior; County of Suffork *v.*, 562 F. 2d 1368 (2d Cir. 1977), *cert. denied*, 434 U.S. 1064, 98 S. Ct. 1238 (1978) 26
Secretary of the Interior; Humboldt Placer Mining Co. *v.*, 549 F. 2d 622 (9th Cir.), *cert. denied*, 434 U.S. 836 (1977) 42
Secretary of the Interior; Rawls *v.*, 460 F. 2d 1200 (9th Cir. 1972) 397
Seldovia Native Association, Inc., Appeal of, 1 ANCAB 65, 78, 83 I.D. 461 (1976) 424
Seminole Nation *v.* U.S., 316 U.S. 286, 297 (1942) 530
Shale Oil Co., 55 I.D. 287 (1935) 254
Sharples Chemicals, Inc., Nat'l Labor Relations Board *v.*, 209 F. 2d 645 (6th Cir. 1954) 639

Page

aughnessy; U.S. *ex rel.* Ac- ardi *v.*, 347 U.S. 260 (1954) 194, 322
ell Oil Co. *v.* Andrus, 591 F. 2d 397 (10th Cir. 1979) 539
ell Oil Co.; Andrus *v.*, ____ U.S. ____ 64 L.Ed.2d 593 (1980) 536
ell Oil Co.; Andrus *v.* 48 U.S. L.W. 4603 (June 3, 1980) 260
ell Oil Co. *v.* Kleppe, 426 F. Supp. 894 (D. Colo. 1977), *ff'd* 591 F. 2d 597 (10th Cir. 1979) 260, 539
ell Oil Co. *v.* Kleppe, No. 74-F-739 (D. Colo. Jan. 17, 1977) 261
oshone Tribe of Indians, U.S. *v.*, 304 U.S. 111 (1938) 194
oshone Indians *v.* U.S., 324 U.S. 335, 353 (1945) 527
reeve *v.* Greer, 65 Ariz. 35, 173 P. 2d 641 (1946) 354
Lite, Inc., GSBCA No. 2442 (May 7, 1968), 68-1 BCA par. 7032 412
erra Club *v.* Hodel, 544 F. 2d 1036 (9th Cir. 1976) 33
mmons; Mullen *v.*, 234 U.S. 192 (1914) 104
mon *v.* Califano, 593 F. 2d 121 (9th Cir. 1979) 138
nith; Hy-yu-tse-mil-kin *v.*, 197 U.S. 401 (1904) 105
nith; Parsons *v.*, 359 U.S. 215 (1959) 663
mith; Union Oil Co. *v.*, 249 U.S. 337, 349 (1919) 268
mith's Estate, *In re*, 86 Cal. App. 2d 456, 195 P. 2d 842 (1948) 315
olicitor's Opinion, 54 I.D. 294 (1933), *approved in* Foster *v.* Seaton, 271 F. 2d 836 (D.C. Cir. 1959), *recognized in* Verrue *v.* U.S., 457 F. 2d 1202 (9th Cir. 1972) 389
olicitor's Opinion, M-36071, 60 I.D. 477 (1951) 486
  M-36629, 69 I.D. 110 (1962) 619
  61 I.D. 37 (1952) 103, 107
  84 I.D. 54, 62 (1976) 110
  84 I.D. 443, 453 (1977) 110

Page

  86 I.D. 307, 318 (1979) 110
Southern Ute Tribe of Southern Ute Reservation; Martinez *v.*, 249 F. 2d 915 (10th Cir. 1957) 510
Southwest Exploration Co., Commissioner *v.*, 350 U.S. 308, 314 (1956) 663
Spotted Horse, Martin, Sr., Estate of, 2 IBIA 265, 81 I.D. 227 (1974) 103, 108
Springer; U.S. *v.*, 491 F. 2d 239 (9th Cir.), *cert. denied*, 419 U.S. 834 (1974) 42, 265, 635
Squire *v.* Capoeman, 351 U.S. 1 (1956) 106
S.R.A., Inc. *v.* Minnesota, 327 U.S. 558, 66 S. Ct. 749, 90 L. Ed. 851 (1946) 354
Star Coal Co. *v.* Andrus, No. 79-171-2 (S.D. Iowa, Feb. 13, 1980) 575
State; J. W. Kelly & Co. *v.*, 123 Tenn. 516, 132 S.W. 193, 201 (1910) 200
State of Alaska, Appeal of, 1 ANCAB 281, 83 I.D. 685 (1976) 287
State of Alaska & Seldovia Native Association, Inc., Appeal of, 2 ANCAB 1, 84 I.D. 349 (1977) 85; 281, 288, 368, 374
Stineman, *In re*, 155 F. 2d 755 (3d Cir. 1946), *reversed on other grounds sub nom.*, United States National Bank *v.* Chase National Bank, 331 U.S. 28 (1947) 505
Strycker's Bay Neighborhood Council, Inc. *v.* Karlen, 48 L.W. 3433 (Jan. 8, 1980) 25
Summers; Freeman *v.*, 42 L.D. 201 (1927) 536
Sunbeam Coal Corp., 2 IBSMA 222, 87 I.D. 383 (1980) 648
Sun Oil Co. *v.* U.S., 572 F. 2d 786, 814 (1978) 626
Suquamish Indian Tribe; Oliphant *v.*, 435 U.S. 191, 206 (1978) 531
Tallman; Udall *v.*, 380 U.S. 1 (1965) 299

Page

Tanacross, Inc., Appeal of, 4 ANCAB 173, 87 I.D. 123 (1980) 484
Taunah; Jones *v.*, 186 F. 2d 445 (10th Cir. 1951), *rev'd*, Squire *v.* Capoeman, 351 U.S. 1 (1956) 106
Taylor; U.S. *v.*, 19 IBLA 9, 82 I.D. 68 (1975) 42, 389
Thomas *v.* Gay, 169 U.S. 264, 271 (1898) 534
Thompson *v.* Fugate, 347 F. Supp. 120 (E.D. Va. 1972) 30
Thunderbird Coal Corp., 1 IBSMA 85, 86 I.D. 38 (1979) 432
Tooahnippah *v.* Hickel, 397 U.S. 598 (1970) 66, 105
Tooisgah, Phillip, Estate of, 4 IBIA 189, 82 I.D. 541 (1975), *aff'd*, Tooisgah *v.* Kleppe, 481 F. Supp. 913 (W.D. Okla. 1976) 106
Top Sky; U.S. *v.*, 547 F. 2d 483, 484, 486, 488 (9th Cir. 1976) 534
Toptiki Coal Corp, 2 IBSMA 173, 87 I.D. 331 (1980) 647
Treasure Salvors *v.* Unidentified Wrecked & Abandoned Sailing Vessel, 569 F. 2d 330 (5th Cir. 1978) 594
Trickey *v.* Zumwalt, 83 N.M. 283, 491 P. 2d 166 (1971) 354
Trimble, Deta Mona & Jessie *v.* Gordon, Joseph Roosevelt, 430 U.S. 762, 52 L. Ed. 2d 31, 97 S. Ct. 1459 (1977) 319
Tuscarora Indian Nation; FPC *v.*, 362 U.S. 99, 120 (1960) 534
TVA *v.* Hill, 437 U.S. 153, 172-184 (1978) 534
Udall; Converse *v.*, 399 F. 2d 616 (9th Cir. 1968), *cert. denied*, 393 U.S. 1025 (1969) 538, 633
Udall; Couch *v.*, 404 F. 2d 97 (10th Cir. 1968) 108, 515
Udall; Oil Shale Corp. (The) *v.*, 261 F. Supp. 954 (D. Colo. 1966) 256
Udall *v.* Oil Shale Corp. (The), 406 F. 2d 759 (10th Cir. 1969) 257
Udall; Running Horse *v.*, 211 F. Supp. 586 (D.D.C. 1962) 103, 106

Page

Udall *v.* Tallman, 380 U.S. 1 (1965) 299
Unidentified Wrecked & Abandoned Sailing Vessel; Treasure Salvors *v.*, 569 F. 2d 330 (5th Cir. 1978) 594
Union Bank & Savings Co.; Grain Merchants of Indiana, Inc. *v.*, 408 F. 2d 209 (7th Cir. 1969) 507
Union Carbide Corp. *v.* Andrus, 9 ELR 20701 (S.D.W.Va. 1980) 248, 326
Union Oil Co. *v.* Smith, 249 U.S. 337, 349 (1919) 268
Union Oil Co. of Calif., 71 I.D. 169 (1964) 255
72 I.D. 313 (1965) 255
Union Oil Co. of Calif.; Lowe *v.*, 487 F. 2d 477 (9th Cir. 1973), *cert. denied* 417 U.S. 931 (1974) 479
Union Oil Co. of Calif. *v.* Morton, 512 F. 2d 743, 748, 751 (9th Cir. 1975) 77, 600
Union Pacific Railroad Co.; Kindred *v.*, 225 U.S. 582 (1912) 425
United Air Lines *v.* McMann, 434 U.S. 192, 199 (1977) 602
United Mfg. Co., 65 I.D. 106, 118, n.4 (1958) 73
U.S.; Adams *v.*, 318 F. 2d 861 (9th Cir. 1963) 634
U.S. *v.* Alexander, 602 F. 2d 1228 (5th Cir. 1979) 594
U.S. *v.* Allard, 397 F. Supp. 429, 431 (D. Mont. 1975) 534
U.S. *v.* Anderson, 74 I.D. 292 (1967) 51
U.S.; Arundel Corp. *v.*, 103 Ct. Cl. 688 (May 7, 1945), *cert. denied*, Oct. 15, 1945, *rehearing denied*, Nov. 13, 1945 59
U.S. *v.* Bergdal, 74 I.D. 245, 249-52 (1967) 40, 637
U.S.; Bledsoe *v.*, 349 F. 2d 605, 607 (10th Cir. 1965) 195
U.S. *v.* Bohme, 48 IBLA 267, 87 I.D. 248 (1980) 536
U.S.; Bond *v.*, 181 F. 613 (C.C.Or. 1910) 105

Page

U.S. *v.* Borden Co., 308 U.S. 188, 198–199 (1939) 550
U.S.; Bowling *v.*, 233 U.S. 528 (1914) 108
U.S. *v.* Bunkowski, 5 IBLA 102, 79 I.D. 43 (1972) appeal pending, Bunkowski *v.* Applegate, Civ. No. R–76–182–BRT (D. Nev. filed, Sept. 22, 1976) 40
U.S. *v.* Calif., 322 U.S. 10, 40 (1947) 278
U.S.; Calif. *v.*, 438 U.S. 645, 654 (1978) 636
U.S.; Cameron *v.*, 252 U.S. 450 (1920) 42, 269, 394, 537, 633
U.S.; CBN Corp. *v.*, 364 F. 2d 393 (Ct. Cl. 1966) 664
U.S.; Choctaw Nation *v.*, 318 U.S. 423, 432 (1943) 527
U.S. *v.* Clayton, 198 F. Supp. 18, 21 (W. D. La. 1961) 426
U.S. *v.* Coleman, 390 U.S. 599 (1968) 41, 270, 389, 537, 633
U.S.; Community & Johnson Corp. *v.*, 156 F. Supp. 440 (D.N.J. 1957) 638
U.S. *v.* Consolidated Mines & Smelting Co., Ltd., 455 F. 2d 432 (9th Cir. 1971) 142
U.S.; Critzer *v.*, ___ Ct. Cl. ___ (Apr. 18, 1979), 47 U.S.L.W. 2684 106
U.S. *v.* Crocker, 60 I.D. 285 (1949) 40, 488
U.S. *v.* Cutler, 37 F. Supp. 724 (D. Idaho 1941) 534
U.S. *v.* Denison, 76 I.D. 233, 239 (1969) 538
.S. *v.* Dickson, 40 U.S. (15 Pet.) 141 (1841) 141
.S.; Donnelly *v.*, 228 U.S. 243, 259, 267 (1913) 268, 636
.S.; Dravo Corp. *v.* 594 F. 2d 842 (Ct. Cl. 1979) 231
.S. *v.* Edwards, 9 IBLA 197, 203 (1973), *aff'd*, Edwards *v.* Kleppe, 588 F. 2d 671 (9th Cir. 1978) 538
S.; Filtrol Corp. *v.*, 487 F. 2d 536 (Ct. Cl. 1973) 664
S.; Freese *v.*, No 334–78 (Ct. Cl., filed July 24, 1978) 396

Page

U.S. *v.* Fryberg, 622 F. 2d 1010 (9th Cir. 1890) 532
U.S. *v.* Georgia Pacific Co., 421 F. 2d 92, 96 (9th Cir. 1970) 141
U.S. *v.* Giwosky, 349 F. Supp. 1200 (E. D. Wis. 1972) 354
U.S.; G. L. Christian & Assoc. *v.*, 312 F. 2d 418, 427, *rehearing denied*, 160 Ct. Cl. 58 (1963), *cert. denied*, 375 U.S. 954 (1963), *rehearing denied*, 376 U.S. 929 (1964) 192
U.S. *v.* Grimaud, 220 U.S. 506, 31 S. Ct. 480, 483, 55 L. Ed. 563 (1911) 426
U.S. *v.* Guzman, 18 IBLA 109, 81 I.D. 685 (1974) 394
U.S.; Halbert *v.*, 283 U.S. 753 (1931) 513
U.S. *v.* Heffner, 420 F. 2d 809 (4th Cir. 1969) 194
U.S.; Highway Products, Inc. *v.*, 208 Ct. Cl. 926, 943 (1976) 339
U.S.; Hopkins *v.*, 414 F. 2d 464 (9th Cir. 1969) 104
U.S.; House *v.*, 144 F. 2d 555, *cert. denied*, 323 U.S. 781 (1944) 106
U.S. *v.* Ideal Cement Co., 5 IBLA 235, 79 I.D. 177 (1972), *aff'd sub nom.* Ideal Basic Industries *v.* Morton, 542 F. 2d 1364 (9th Cir. 1976) 41
U.S. *v.* Iron Silver Mining Co., 128 U.S. 673 (1888) 270
U.S.; Irwin & Leighton *v.*, 101 Ct. Cl. 455 (1944) 184
U.S. *v.* Isbell Construction Co., 4 IBLA 205, 78 I.D. 385 (1971) 42
U.S. *v.* Jenkins, 75 I.D. 312, 318 (1968) 538
U.S. *v.* Jim, 409 U.S. 80 (1972) 194
U.S. *v.* Kagama, 118 U.S. 375 (1886) 109
U.S. *v.* Lee, 106 U.S. 196, 220 (1882) 577
U.S. *v.* Mazurie, 419 U.S. 544 (1975) 371, 510
U.S. *v.* McCall, 7 IBLA 21, 79 I.D. 457 (1972) 50

Page

U.S. *v.* McClarty, 17 IBLA 20, 81 I.D. 472 (1974) 41, 55

U.S. *v.* McElvain, 272 U.S. 633 (1926) 141

U.S.; Menominee Tribe *v.*, 391 U.S. 404 (1968) 526

U.S.; Miller *v.* 294 U.S. 435, 439 (1935), *rehearing denied*, 294 U.S. 734 (1935) 18

U.S. *v.* Mitchell, ___ U.S. ___, 100 S. Ct. 1349 (1980) 514

U.S. *v.* Mobley, 45 F. Supp. 407 (N.D. Calif. 1942) 54

U.S.; New Brunswick *v.*, 276 U.S. 547, 48 S. Ct. 371, 72 L.Ed. 693 (1928) 354

U.S. *v.* Nixon, 418 U.S. 683, 696 (1974) 322

U.S. *v.* Noble, 237 U.S. 74 (1915) 108

U.S.; Okla. Gas & Electric Co. *v.*, 609 F.2d 1365 (10th Cir. 1979) 108

U.S. *v.* O'Leary, 63 I.D. 341 (1956) 259

U.S. *v.* Payne, 264 U.S. 446 (1924) 513, 527

U.S.; Rawson *v.*, 225 F. 2d 855 (9th Cir. 1955) 41

U.S. *v.* Ray 423 F. 2d 16 (5th Cir. 1970) 594

U.S. *v.* Ruby Co., 588 F. 2d 697, 703-04 (9th Cir. 1978) 138, 142

U.S. *v.* Russell, 40 IBLA 309 (1979), *aff'd sub nom.* Russell *v.* Peterson, Civ. No. 79-949 (D. Or., June 23, 1980) 635

U.S.; Rutledge *v.*, 438 F. 2d 347, 351 (5th Cir. 1970) 663

U.S.; Schuab *v.*, 207 F. 2d 325 (9th Cir. 1953) 41, 54

U.S. *v.* Schaub, 103 F. Supp. 873 (D.C. Alaska 1952), *aff'd*, 207 F.2d 325 (9th Cir. 1953) 489

U.S.; Seminole Nation *v.*, 316 U.S. 286, 297 (1942) 530

U.S.; Shoshone Indians *v.*, 324 U.S. 335, 353 (1945) 527

U.S. *v.* Shoshone Tribe of Indians, 304 U.S. 111 (1938) 194

Page

U.S. *v.* Springer, 491 F. 2d 239 (9th Cir.), *cert. denied* 419 U.S. 834 (1974) 42, 265, 635

U.S.; Sun Oil Co. *v.*, 572 F. 2d 786, 814 (1978) 626

U.S. *v.* Taylor, 19 IBLA 9, 82 I.D. 68 (1975) 42, 389

U.S. *v.* Top Sky, 547 F. 2d 483, 484, 486, 488 (9th Cir. 1976) 534

U.S. *v.* Utah Construction and Mining Co., 384 U.S. 394 (1966) 455

U.S.; Verrue *v.*, 457 F. 2d 1202 (9th Cir. 1972) 45

U.S. *v.* Washington, 384 F. Supp. 312, 411 (W.D. Wash. 1974) *affirmed*, 520 F. 2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976) 534

U.S. *v.* White, 508 F. 2d 453 (8th Cir. 1974) 534

U.S.; Wickham Contracting Co., Inc. *v.*, 212 Ct. Cl. 318, 328, 329 (1976) 339

U.S.; Williams *v.*, 138 U.S. 514 (1891) 353

U.S. *v.* Winegar, 16 IBLA 112, 81 I.D. 370 (1974), *rev'd on other grounds sub nom.* Shell Oil Co. *v.* Kleppe, 426 F. Supp. 894 (D. Colo. 1977) 110, 537

U.S. *v.* Zweifel, 508 F. 2d 1150, 1157 (10th Cir. 1975), *cert. denied, sub nom.* Roberts *v.* U.S., 423 U.S. 829 (1975), *rehearing denied*, 423 U.S. 1008 (1975) 43, 265

U.S. *v.* Zweifel, 11 IBLA 53, 80 I.D. 323 (1973) 639

U.S. Department of the Interior; Kelly *v.*, 330 F. Supp. 1095, 1101 (E.D. Calif. 1972) 427

U.S. *ex rel.* Accardi *v.* Shaughnessy, 347 U.S. 260 (1954) 194

U.S. *ex rel.* Krushnic; Wilbur *v.*, 280 U.S. 306 (1930) 253

U.S. Immigration & Naturalization Service *v.* Hibi, 414 U.S. 5 (1973) 138

U.S. Land Ass'n.; Knight *v.*, 142 U.S. 161 (1891) 636

Page

U.S. Nuclear Regulatory Comm.; Miss. Power & Light *v.*, 601 F. 2d 223 (5th Cir. 1979), *cert. denied*, 100 S. Ct. 1066 (1980) 476

Universal Camera Corp. *v.* N.L.R.B. 340 U.S. 474, 484–88 (1951) 639

Usibelli, Emil, 60 I.D. 515 (1951) 17

Utah Construction and Mining Co., U.S. *v.*, 384 U.S. 394 (1966) 455

Utah International Inc. *v.* Andrus, Civ. No. C77–0225 (D. Utah CD June 15, 1979) 20, 81

Utah Salt Co. *v.* Wise, 370 F. 2d 976 (10th Cir. 1967) 664

Val Vue Sewer Dist.; Committee *v.*, 14 Wash. App. 838, 545 P.2d 42 (1976) 354

Velde; Ely *v.*, 497 F. 2d 252 (4th Cir. 1974) 31

Vermont Yankee Nuclear Power Corp. *v.* NRDC, 435 U.S. 519, 551 (1978), *citing* NRDC *v.* Morton, 458 F. 2d 827, 837–38 (1972) 25

Verrue *v.* U.S., 457 F. 2d 1202 (9th Cir. 1972) 45

Virginia-Colorado Development Corp., 53 I.D. 666 (1932) 254

Virginia-Colorado Development Corp.; Ickes *v.*, 295 U.S. 639 (1935) 254

Virginia Iron, Coal & Coke Co., 2 IBSMA 165, 87 I.D. 327, 330 (1980) 382, 446, 672

Virginia Surface Mining & Reclamation Ass'n, Inc. *v.* Andrus, 483 F. Supp. 425 (W.D. Va. 1980) 248

Virginia Surface Mining & Reclamation Ass'n; Andrus *v.*, 48 U.S.L.W. 3601 (Mar. 18, 1980) 248

itarelli *v.* Seaton, 359 U.S. 535 (1959) 322

olpe; Daly *v.*, 514 F.2d 1106, 1109–10 (9th Cir. 1975) 33

ahlenmaier; McKay *v.*, 226 F. 2d 35, 43 (D.C. Cir. 1955) 111, 322

alks With A Wolf, Estate of, 65 I.D. 92 (1958) 316

Page

Warr *v.* Norton, 190 Okla. 114, 121 P.2d 583 (1942) 188

Washington Game Dept.; Puyallup Tribe *v.*, 391 U.S. 392, 398 (1968) 528

Washington Game Department *v.* Puyallup Tribe, 414 U.S. 44, 48, 49 (1973) 528

Washington Game Dept.; Puyallup Tribe *v.*, 433 U.S. 165, 171 (1977) 528

Washington State Commercial Passenger Fishing Vessel Ass'n; Washington *v.*, 443 U.S. 658, 679 (1979) 529

Washington; U.S. *v.* 384 F. Supp. 312, 411 (W.D. Wash. 1974), *aff'd* 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976) 534

Washington *v.* Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 679 (1979) 529

Watch *v.* Harris, 603 F. 2d 310 (2d Cir. 1979) 33

Weaver, Francis D., 53 I.D. 175 (1930) 254

Webster College; Girardier *v.*, 563 F. 2d 1267 (8th Cir. 1977) 505

Weintraub *v.* Rural Electrification Admin., 457 F. Supp. 78 (M.D. Pa. 1978) 31

Western Engineering, Inc., 1 IBSMA 202, 204–205, 86 I.D. 336 (1979) 198, 443

Whatcom County Park Board *v.* Portland Area Director, 6 IBIA 196, 84 I.D. 938 (1977) 195

White; U.S. *v.*, 508 F. 6d 453 (8th Cir. 1974) 534

White Winter Coals, Inc., 1 IBSMA 305, 311–312, 86 I.D. 675, 678, 679 (1979) *aff'd mem.*, White Winter Coals, Inc. *v.* Andrus, No. 3–80–3 (E.D. Tenn. Apr. 13, 1980) 170, 209, 308

Wickham Contracting Co., Inc. *v.* U.S., 212 Ct. Cl. 318, 328, 329 (1976) 339

Wilbur *v.* U.S. *ex rel.* Krushnic, 280 U.S. 306 (1930) 253

Page

Wilcox *v.* Jackson, 38 U.S. (13 Pet.) 498 (1839) ---------- 488, 606

Wilderness Society *v.* Morton, 479 F. 2d 842, 856 (D.C. Cir.), *cert. denied,* 411 U.S. 917 (1973) ---------- 295

Williams *v.* U.S., 138 U.S. 514 (1891) ---------- 353

Wilson Farms Coal Co., 2 IBSMA 118, 87 I.D. 248 (1980) ---------- 326

Wilson, Howard M., 63 I.D. 36 (1956) ---------- 354

Winegar; U.S. *v.*, 16 IBLA 112, 81 I.D. 370 (1974), *rev'd on other grounds sub nom,* Shell Oil Co. *v.* Kleppe, 426 F. Supp. 894 (D. Colo. 1977) ---------- 110, 537

Winkler *v.* Andrus, 594 F. 2d 775 (10th Cir. 1979) ---------- 470

Wise; Utah Salt Co. *v.*, 370 F. 2d 976 (10th Cir. 1967) ---------- 664

WOKO; American Communications Comm. *v.*, 329 U.S. 223, 229 (1946) ---------- 577

Page

Wold, Peter I., II, 13 IBLA 63, 80 I.D. 623 (1973) ---------- 17

Wolenberg, P., 29 L.D. 302, 304 (1899) ---------- 252

Womble; Castle *v.*, 19 L.D. 455, (1894), *approved in* Chrisman *v.* Miller, 197 U.S. 313 (1905) -- 41, 389, 538, 633

Wootan; Noland *v.*, 102 Ariz. 192, 427 P. 2d 143 (1967) ---------- 171

Worcester *v.* Georgia, 31 U.S. (6 Pet.) 515 (1832) ---------- 108, 194

Wyman-Gordon Co.; NLRB *v.*, 89 S. Ct. 1426, 1429, 394 U.S. 759, 22 L.D. Ed. 709 (1969) --- 427

Zumwalt; Trickey *v.*, 83 N.M. 278, 491 P. 2d 166 (1971) ------ 354

Zweifel; U.S. *v.*, 11 IBLA 53, 80 I.D. 323 (1973) ---------- 639

508 F. 2d 1150, 1157 (10th Cir. 1975), *cert. denied, sub nom.* Roberts *v.* U.S., 423 U.S. 829 (1975), *rehearing denied,* 423 U.S. 1008 (1975) ---------- 43, 265

TABLE OF OVERRULED AND MODIFIED CASES FOR THE DEPARTMENT OF THE INTERIOR[1]

Volumes 1 to 87, Inclusive

Administrative Ruling (43 L.D. 293); modified, 48 L.D. 97 (1921).

Administrative Ruling (46 L.D. 32); vacated, 51 L.D. 287 (1925).

Administrative Ruling (52 L.D. 359); distinguished, 59 I.D. 4, 5 (1945).

Administrative Ruling, Mar. 13, 1935; overruled, 58 I.D. 65, 81 (See 59 I.D. 69, 76 (1945).

Affinity Mining Co., 5 IBMA 126, 82 I.D. 439, 1975-1976 OSHD par. 19,992 (1975); set aside. Order of dismissal below vacated and case remanded; 6 IBMA 193, 83 I.D. 236 (1976).

Alabama By-Products Corp., 6 IBMA 168, 1975-1976 OSHD par. 20,756 (1976); set aside, 7 IBMA 85, 83 I.D. 574 (1976).

Alaska Commercial Co. (39 L.D. 597); vacated, 41 L.D. 75 (1912).

Alaska Copper Co. (32 L.D. 128); modified in part, 37 L.D. 674; 42 L.D. 255 (1913).

Alaska-Dano Mines Co. (52 L.D. 550); overruled so far as in conflict, 57 I.D. 244 (1941).

Alaska Railroad, 3 ANCAB 273, 86 I.D. 397 (1979); affirmed in part, vacated in part, 3 ANCAB 351, 86 I.D. 452 (1979).

Alaska, State of & Seldovia Native Ass'n., 2 ANCAB 1, 84 I.D. 349 (1977), modified, Valid Existing Rights Under the Alaska Native Claims Settlement Act, Sec. Order No. 3016, 85 I.D. 1 (1978).

Aldrich *v.* Anderson (2 L.D. 71); overruled, 15 L.D. 201 (1892).

Alheit, Rosa (40 L.D. 145); overruled so far as in conflict, 43 L.D. 342 (1914).

Alien Heirs (2 L.D. 98); overruled, 16 L.D. 463, 464 (1893).

Allen, Henry J. (37 L.D. 596); modified, 54 I.D. 4 (1932).

Allen, Sarah E. (40 L.D. 586); modified, 44 L.D. 331 (1915).

Americus *v.* Hall (29 L.D. 677); vacated, 30 L.D. 388 (1900).

Amidon *v.* Hegdale (39 L.D. 131); overruled, 40 L.D. 259 (1911) (See 42 L.D. 557).

Anderson, Andrew (1 L.D. 1), overruled, 34 L.D. 606 (1906) (See 36 L.D. 14).

Anderson *v.* Tannehill (10 L.D. 388), overruled, 18 L.D. 586 (1894).

Applicability of Montana Tax to Oil and Gas Leases of Ft. Peck Lands—Opinions of Assistant Secretary (Oct. 27, 1966), is *superseded* to the extent that is is *inconsistent* with Solicitor,s Opinion—Tax Status of the Production of Oil and Gas From Leases of the Ft. Peck Tribal Lands Under the 1938 Mineral Leasing Act, M-36896, 84 I.D. 905 (1977).

Archer, J.D., A-30750 (May 31, 1967); overruled, 79 I.D. 416 (1972).

Armstrong *v.* Matthews (40 L.D. 496); overruled so far as in conflict, 44 L.D. 156 (1915).

Arnold *v.* Burger (45 L.D. 453); modified, 46 L.D. 320 (1918).

Arundell, Thomas F. (33 L.D. 76); overruled so far as in conflict, 51 L.D. 51 (1925).

Ashton, Fred W. (31 L.D. 356); overruled, 42 L.D. 215 (1913).

---

[1] For judicial modification and reversals see the Table of Suits for Judicial Review on page XIII. Abbreviations used in this table are explained in the note on page LXXXIII.

Atlantic and Pacific R.R. Co. (5 L.D. 209); overruled, 27 L.D. 241 (1898).

Auerbach, Samuel H. (29 L.D. 208); overruled, 36 L.D. 36 (1907) (See 37 L.D. 715).

Baca Float No. 3 (5 L.D. 705; 12 L.D. 676; 13 L.D. 624); vacated so far as in conflict, 29 L.D. 44 (1899).

Bailey, John W. (3 L.D. 386); modified, 5 L.D. 513 (1887).

Baker *v.* Hurst (7 L.D. 457); overruled, 8 L.D. 110 (1889) (See 9 L.D. 360).

Barash, Max, 63 I.D. 51 (1956); was overruled in part by Solicitor's Opinion—Issuance of Noncompetitive Oil & Gas Leases on Lands within the Geologic Structures of Producing Oil or Gas Fields, M—36686, 74 I.D. 285 (1967); overruled, Permian Mud Service, Inc., 31 IBLA 150, 84 I.D. 342 (1977).

Barbour *v.* Wilson (23 L.D. 462); vacated, 28 L.D. 62 (1899).

Barbut, James (9 L.D. 514); overruled so far as in conflict, 29 L.D. 698 (1900).

Barlow, S. L. M. (5 L.D. 695); *contra*, 6 L.D. 648 (1888).

Barnhurst *v.* State of Utah (30 L.D. 314); modified, 47 L.D. 359 (1920).

Bartch *v.* Kennedy (3 L.D. 437); overruled, 6 L.D. 217 (1887).

Beery *v.* Northern Pacific Ry. Co. (41 L.D. 121); overruled, 43 L.D. 536 (1914).

Bennet, Peter W. (6 L.D. 672); overruled, 29 L.D. 565 (1900).

Bernardini, Eugene J. (62 I.D. 231); distinguished, 63 I.D. 102 (1956).

Big Lark (48 L.D. 479); distinguished, 58 I.D. 680, 682 (1944).

Birkholz, John (27 L.D. 59); overruled so far as in conflict, 43 L.D. 221 (1914).

Birkland, Bertha M. (45 L.D. 104); overruled, 46 L.D. 110 (1917).

Bivins *v.* Shelly (2 L.D. 282); modified, 4 L.D. 583 (1886).

Black, L. C. (3 L.D. 101); overruled, 34 L.D. 606 (1906) (See 36 L.D. 14).

Blenkner *v.* Sloggy (2 L.D. 267); overruled, 6 L.D. 217 (1887).

Boeschen, Conrad William (41 L.D. 309); vacated, 42 L.D. 244 (1913).

Bosch, Gottlieb (8 L.D. 45); overruled, 13 L.D. 42 (1891).

Box *v.* Ulstein (3 L.D. 143); overruled, 6 L.D. 217 (1887).

Boyle, William (38 L.D. 603); overruled so far as in conflict, 44 L.D. 331 (1915).

Braasch, William C. and Christ C. Prange (48 L.D. 448); overruled so far as in conflict, 60 I.D. 417, 419.

Bradford, J. L. (31 L.D. 132); overruled, 35 L.D. 399 (1907).

Bradstreet *v.* Rehm (21 L.D. 30); reversed, 21 L.D. 544 (1895).

Brady *v.* Southern Pacific R.R. Co (5 L.D. 407 and 658); overruled, 20 L.D. 259 (1895).

Brandt, William W. (31 L.D. 277); overruled, 50 L.D. 161 (1923).

Braucht *v.* Northern Pacific Ry. Co. (43 L.D. 536, 538); modified, 44 L.D. 225 (1915).

Brayton, Homer E. (31 L.D. 364); overruled so far as in conflict, 51 L.D. 305 (1925).

Brick Pomeroy Mill Site (34 L.D. 320); overruled, 37 L.D. 674 (1909).

Brown *v.* Cagle (30 L.D. 8); vacated, 30 L.D. 148 (1900) (See 47 L.D. 406).

Brown, Joseph T. (21 L.D. 47); overruled so far as in conflict, 31 L.D. 222 (1902) (See 35 L.D. 399).

Browning, John W. (42 L.D. 1); overruled so far as in conflict, 43 L.D. 342 (1914).

Bruns, Henry A. (15 L.D. 170); overruled so far as in conflict, 51 L.D 454 (1926).

Bundy *v.* Livingston (1 L.D. 152); overruled, 6 L.D. 280, 284 (1887).

Burdick, Charles W. (34 L.D. 345); modified, 42 L.D. 472 (1913).

Burgess, Allen L. (24 L.D. 11); overruled so far as in conflict, 42 L.D. 321 (1913).

Burkholder *v.* Skagen (4 L.D. 166); overruled, 9 L.D. 153 (1889).

Burnham Chemical Co. *v.* United States Borax Co. (54 I.D. 183); overruled in substance, 58 I.D. 426, 429 (1944).

Burns, Frank (10 L.D. 365); overruled so far as in conflict, 51 L.D. 454 (1926).

Burns *v.* Bergh's Heirs (37 L.D. 161); vacated, 51 L.D. 268 (1925).

Buttery *v.* Sprout (2 L.D. 293); overruled, 5 L.D. 591 (1887).

Cagle *v.* Mendenhall (20 L.D. 447); overruled, 23 L.D. 533 (1896).

Cain *v.* Addenda Mining Co. (24 L.D. 18); vacated, 29 L.D. 62 (1899).

California and Oregon Land Co. (21 L.D. 344); overruled, 26 L.D. 453 (1898).

California, State of (14 L.D. 253); vacated, 23 L.D. 230 (1896).

California, State of (15 L.D. 10); overruled, 23 L.D. 423, 31 L.D. 335 (1902).

California, State of (19 L.D. 585); vacated, 28 L.D. 57 (1899).

California, State of (22 L.D. 428); overruled, 32 L.D. 34 (1903).

California, State of (32 L.D. 346); vacated, 50 L.D. 628 (1924) (See 37 L.D. 499 and 46 L.D. 396).

California, State of (44 L.D. 118); overruled, 48 L.D. 97, 98 (1921).

California, State of (44 L.D. 468); overruled, 48 L.D. 97, 98 (1921).

California, State of *v.* Moccettini (19 L.D. 359); overruled, 31 L.D. 335 (1902).

California, State of *v.* Pierce (9 C.L.O. 118); modified, 2 L.D. 854.

California, State of *v.* Smith (5 L.D. 543); overruled, 18 L.D. 343 (1894).

Call *v.* Swain (3 L.D. 46); overruled, 18 L.D. 373 (1894).

Cameron Lode (13 L.D. 369); overruled so far as in conflict, 25 L.D. 518 (1897).

Camplan *v.* Northern Pacific R.R. Co. (28 L.D. 118); overruled so far as in conflict, 29 L.D. 550 (1900).

Case *v.* Church (17 L.D. 578); overruled, 26 L.D. 453 (1898).

Case *v.* Kupferschmidt (30 L.D. 9); overruled so far as in conflict, 47 L.D. 406 (1920).

Castello *v.* Bonnie (20 L.D. 311); overruled, 22 L.D. 174 (1896).

Cate *v.* Northern Pacific Ry. Co. (41 L.D. 316); overruled so far as in conflict, 43 L.D. 60 (1914).

Cawood *v.* Dumas (22 L.D. 585); vacated, 25 L.D. 526 (1897).

Centerville Mining and Milling Co. (39 L.D. 80); no longer controlling, 48 L.D. 17 (1921).

Central Pacific R.R. Co. (29 L.D. 589); modified, 48 L.D. 58 (1921).

Central Pacific R.R. Co. *v.* Orr (2 L.D. 525); overruled, 11 L.D. 445 (1890).

Chapman *v.* Williamette Valley and Cascade Mountain Wagon Road Co. (13 L.D. 61); overruled, 20 L.D. 259 (1895).

Chappell *v.* Clark (27 L.D. 334); modified, 27 L.D. 532 (1898).

Chicago Placer Mining Claim (34 L.D. 9); overruled, 42 L.D. 453 (1913).

Childress *v.* Smith (15 L.D. 89); overruled, 26 L.D. 453 (1898).

Christofferson, Peter (3 L.D. 329); modified, 6 L.D. 284, 624.

Claflin *v.* Thompson (28 L.D. 279); overruled, 29 L.D. 693 (1900).

Claney *v.* Ragland (38 L.D. 550) (See 43 L.D. 485).

Clark, Yulu S. (A-22852) Feb. 20, 1941, unreported; overruled so far as in conflict, 59 I.D. 258, 260 (1946).

Clarke, C. W. (32 L.D. 233); overruled so far as in conflict, 51 L.D. 51 (1925).

Cline *v.* Urban (29 L.D. 96); overruled, 46 L.D. 492 (1918).

Clipper Mining Co. (22 L.D. 527); no longer followed in part, 67 I.D. 417 (1960).

Clipper Mining Co. *v.* Eli Mining and Land Co. (33 L.D. 660); no longer followed in part, 67 I.D. 417 (1960).

Cochran *v.* Dwyer (9 L.D. 478) (See 39 L.D. 162, 225 (1910)).

Coffin, Edgar A. (33 L.D. 245); overruled so far as in conflict, 52 L.D. 153 (1927).

Coffin, Mary E. (34 L.D. 564); overruled so far as in conflict, 51 L.D. 51 (1925).

Colorado, State of (7 L.D. 490); overruled, 9 L.D. 408 (1889).

Computation of Royalty Under Sec. 15, 51 L.D. 283 (1925), overruled, Solicitor's Opinion—Response to Feb. 17, 1976, Request from the General Accounting Office: Interpretation of Mineral Leasing Act of 1920, and Outer Continental Shelf Lands Act Royalty Cause, M-36888 (Oct. 4, 1976), 84 I.D. 54 (1977).

Condict, W.C. (A-23366) June 24, 1942, unreported; overruled so far as in conflict, 59 I.D. 258-260 (1946).

Continental Oil Co., 68 I.D. 186 (1961), overruled in pertinent part by Solicitor's Opinion, M-36921, 87 I.D. 291 (1980).

Continental Oil Co., 74 I.D. 229 (1967), distinguished by Solicitor's Opinion, M-36927, 87 I.D. 616 (1980).

Cook, Thomas C. (10 L.D. 324) (See 39 L.D. 162, 225 (1910)).

Cooke *v.* Villa (17 L.D. 210); vacated, 19 L.D. 442 (1894).

Cooper, John W. (15 L.D. 285); overruled, 25 L.D. 113 (1897).

Copper Bullion and Morning Star Lode Mining Claims (35 L.D. 27); distinguished insofar as it applies to *ex parte* cases, 39 L.D. 574 (1911).

Copper Glance Lode (29 L.D. 542); modified so far as in conflict, 55 I.D. 348 (1935).

Corlis *v.* Northern Pacific R.R. Co. (23 L.D. 265); vacated, 26 L.D. 652 (1898).

Cornell *v.* Chilton (1 L.D. 153); overruled, 6 L.D. 483 (1888).

Cowles *v.* Huff (24 L.D. 81); modified, 28 L.D. 515 (1899).

Cox, Allen H. (30 L.D. 90, 468); vacated, 31 L.D. 114 (1901).

Crowston *v.* Seal (5 L.D. 213); overruled, 18 L.D. 586 (1894).

Culligan *v.* State of Minnesota (34 L.D. 22); modified, 34 L.D. 151 (1905).

Cunningham, John (32 L.D. 207); modified, 32 L.D. 456 (1904).

Dailey Clay Products Co. (48 L.D. 429, 431); overruled so far as in conflict, 50 L.D. 656 (1924).

Dakota Central R.R. Co. *v.* Downey (8 L.D. 115); modified, 20 L.D. 131 (1895).

Davidson, Robert A., 13 IBLA 368 (1973), overruled to the extent inconsistent, J. Burton Tuttle, 49 IBLA 278 87 I.D. 350 (1980).

Davis, E. W., A-29889 (Mar. 25, 1964), no longer followed in part; 80 I.D. 698 (1973).

Davis, Heirs of (40 L.D. 573); overruled, 46 L.D. 110 (1917).

DeLong *v.* Clarke (41 L.D. 278); modified so far as in conflict, 45 L.D. 54 (1916).

Dempsey, Charles H. (42 L.D. 215); modified, 43 L.D. 300 (1914).

Dennison and Willits (11 C.L.O. 261); overruled so far as in conflict, 26 L.D. 122 (1898).

Deseret Irrigation Co. *v.* Sevier River Land and Water Co. (40 L.D. 463); overruled, 51 L.D. 27 (1925).

Devoe, Lizzie A. (5 L.D. 4); modified, 5 L.D. 429 (1887).

Dierks, Herbert (36 L.D. 367); overruled by the unreported case of Thomas J. Guigham, Mar. 11, 1909.

Dixon *v.* Dry Gulch Irrigation Co. (45 L.D. 4); overruled, 51 L.D. 27 (1925).

Douglas and Other Lodes (34 L.D. 556); modified, 43 L.D. 128 (1914).

Dowman *v.* Moss (19 L.D. 526); overruled, 25 L.D. 82 (1897).

Dudymott *v.* Kansas Pacific R.R. Co. (5 C.L.O. 69); overruled so far as in conflict, 1 L.D. 345.

Dunphy, Elijah M. (8 L.D. 102); overruled so far as in conflict, 36 L.D. 561 (1908).

Dyche *v.* Beleele (24 L.D. 494); modified, 43 L.D. 56 (1914).

Dysart, Francis J. (23 L.D. 282); modified, 25 L.D. 188 (1897).

astern Associated Coal Corp., 3 IBMA
331, 81 I.D. 567, 1974–75 OSHD par.
18,706 (1974); overruled in part by
Alabama By-Products Corp. (On
Recon.), 7 IBMA 85, 83 I.D. 574
(1976); overruled in part by Zeigler
Coal Co., 7 IBMA 280, 84 I.D. 127
(1977).

astern Associated Coal Corp., 5 IBMA
185, 82 I.D. 506, 1975–76 OSHD par.
20,041 (1975); set aside in part on
reconsideration, 7 IBMA 14, 83 I.D.
425 (1976).

aston, Francis E. (27 L.D. 600); over-
ruled, 30 L.D. 355 (1900).

ast Tintic Consolidated Mining Co.
(On Rehearing) (41 L.D. 255); va-
cated, 43 L.D. 80 (1914).

liot *v.* Ryan (7 L.D. 322); overruled,
8 L.D. 10 (1889) (See 9 L.D. 360).

Paso Brick Co. (37 L.D. 155); over-
ruled so far as in conflict, 40 L.D.
199 (1911).

son, William C. (6 L.D. 797); over-
ruled, 37 L.D. 330.

lutna, Appeal of, 1 ANCAB 190, 83
I.D. 619 (1976), modified, Valid Ex-
sting Rights under the Alaska Native
Claims Settlement Act, Sec. Order No.
3016, 85 I.D. 1 (1978).

nblen *v.* Weed (16 L.D. 28); modified,
17 L.D. 220 (1893).

ley *v.* Trick (8 L.D. 110); overruled,
L.D. 360.

hardt, Finsans (36 L.D. 154); over-
uled, 38 L.D. 406 (1910).

ping *v.* Johnson (37 L.D. 709); over-
uled, 41 L.D. 289 (1912).

plin, Lee J., 56 I.D. 325 (1938), over-
uled to extent it applies to 1926 Exec-
tive Order to artificially developed
water sources on the public lands, by
olicitor's Opinion, M–36914, 86 I.D.
53 (1979), Federal Water Rights of
he National Park Service, Fish &
Wildlife Service, Bureau of Reclama-
ion and the Bureau of Land Manage-
ent.

ing *v.* Rickard (1 L.D. 146); over-
uled, 6 L.D. 483 (1888).

coner *v.* Price (19 L.D. 167); over-
uled, 24 L.D. 264 (1897).

Fargo No. 2 Lode Claims (37 L.D. 404); modified, 43 L.D. 128; overruled so far as in conflict, 55 I.D. 348 (1935).

Farrill, John W. (13 L.D. 713); overruled so far as in conflict, 52 L.D. 472, 473 (1928).

Febes, James H. (37 L.D. 210); overruled, 43 L.D. 183 (1914).

Federal Shale Oil Co. (53 I.D. 213); overruled so far as in conflict, 55 I.D. 287, 290 (1935).

Ferrell *v.* Hoge (18 L.D. 81); overruled, 25 L.D. 351 (1897).

Fette *v.* Christiansen (29 L.D. 710); overruled, 34 L.D. 167 (1905).

Field, William C. (1 L.D. 68); overruled so far as in conflict, 52 L.D. 472, 473 (1928).

Filtrol Co. *v.* Brittan and Echart (51 L.D. 649); distinguished, 55 I.D. 605 (1936).

Fish, Mary (10 L.D. 606); modified, 13 L.D. 511 (1891).

Fisher *v.* Heirs of Rule (42 L.D. 62, 64); vacated, 43 L.D. 217 (1914).

Fitch *v.* Sioux City and Pacific R.R. Co. 216 L. and R. 184); overruled, 17 L.D. 43 (1893).

Fleming *v.* Bowe (13 L.D. 78); overruled, 23 L.D. 175 (1896).

Florida Mesa Ditch Co. (14 L.D. 265); overruled, 27 L.D. 421 (1898).

Florida Railway and Navigation Co. *v.* Miller (3 L.D. 324); modified, 6 L.D. 716; overruled, 9 L.D. 237 (1889).

Florida, State of (17 L.D. 355); reversed, 19 L.D. 76 (1894).

Florida, State of (47 L.D. 92, 93); overruled so far as in conflict, 51 L.D. 291 1925).

Forgeot, Margaret (7 L.D. 280); overruled, 10 L.D. 629 (1890).

Fort Boise Hay Reservation (6 L.D. 16); overruled, 27 L.D. 505 (1898).

Franco Western Oil Co., 65 I.D. 316, modified, 65 I.D. 427 (1958).

Freeman Coal Mining Co., 3 IBMA 434, 81 L.D. 723, 1974–1975 OSHD par. 19,177 (1974); overruled in part, Zeigler Coal Co., 7 IBMA 280, 84 I.D. 127 (1977).

Freeman, Flossie (40 L.D. 106); overruled, 41 L.D. 63 (1912).

Freeman *v.* Summers, 52 L.D. 201 (1927), is overruled; United States *v.* Winegar, Frank W., 16 IBLA 112, 81 I.D. 370 (1974). Reinstated by U.S. *v.* Bohme (Supp.) 51 IBLA 97, 87 I.D. 535 (1980).

Freeman *v.* Texas and Pacific Ry. Co. (2 L.D. 550); overruled, 7 L.D. 13, 18 (1888).

Fry, Silas A. (45 L.D. 20); modified 51 L.D. 581 (1926).

Fults, Bill, 61 I.D. 437 (1954); overruled, 69 I.D. 181 (1962).

Galliher, Maria (8 C.L.O. 137); overruled 1 L.D. 57 (1880).

Gallup *v.* Northern Pacific Ry. Co. (unpublished); overruled so far as in conflict, 47 L.D. 303, 304 (1920).

Gariss *v.* Borin (21 L.D. 542) (See 39 L.D. 162, 225).

Garrett, Joshua (7 C.L.O. 55); overruled, 5 L.D. 158 (1886).

Garvey *v.* Tuiska (41 L.D. 510); modified, 43 L.D. 229 (1914).

Gates *v.* California and Oregon R.R. Co. (5 C.L.O. 150); overruled, 1 L.D. 336, 342 (1882).

Gauger, Henry (10 L.D. 221); overruled 24 L.D. 81 (1887).

Glassford, A. W. 56 I.D. 88 (1937); overruled to extent inconsistent, 70 I. D. 159 (1963).

Gleason *v.* Pent (14 L.D. 375; 15 L.D. 286); vacated, 53 I.D. 447; overruled so far as in conflict, 59 I.D. 416, 422 (1947).

Gohrman *v.* Ford (8 C.L.O. 6); overruled, 4 L.D. 580 (1886).

Golden Chief "A" Placer Claim (35 L.D. 557); modified, 37 L.D. 250 (1908).

Goldstein *v.* Juneau Townsite (23 L.D. 417); vacated, 31 L.D. 88 (1901).

Goodale *v.* Olney (12 L.D. 324); distinguished, 55 I.D. 580 (1936).

Gotego Townsite *v.* Jones (35 L.D. 18); modified, 37 L.D. 560 (1909).

Gowdy *v.* Connell (27 L.D. 56); vacated, 28 L.D. 240 (1899).

Gowdy *v.* Gilbert (19 L.D. 17); overruled, 26 L.D. 453 (1898).

Gowdy *v.* Kismet Gold Mining Co. (22 L.D. 624); modified, 24 L.D. 191 (1897).

Grampian Lode (1 L.D. 544); overruled, 25 L.D. 495 (1897).

Gregg *v.* State of Colorado (15 L.D. 151); vacated, 30 L.D. 310 (1900).

Grinnel *v.* Southern Pacific R.R. Co. (22 L.D. 438); vacated, 23 L.D. 489 (1896).

Ground Hog Lode *v.* Parole and Morning Star Lodes (8 L.D. 430); overruled, 34 L.D. 568 (See R.R. Rousseau, 47 L.D. 590 (1920).

Guidney, Alcide (8 C.L.O. 157); overruled, 40 L.D. 399 (1912).

Gulf and Ship Island R.R. Co. (16 L.D. 236); modified, 19 L.D. 534 (1894).

Gustafson, Olof (45 L.D. 456); modified, 46 L.D. 442 (1918).

Gwyn, James R. (A-26806) Dec. 17, 1953, unreported; distinguished, 66 I.D. 275 (1959).

Hagood, L.N., 65 I.D. 405 (1958); overruled, Beard Oil Co., 1 IBLA 42, 77 I.D. 166 (1970).

Halvorson, Halvor K. (39 L.D. 456); overruled, 41 L.D. 505 (1912).

Hansbrough, Henry C. (5 L.D. 155); overruled, 29 L.D. 59 (1899).

Hardee, D.C. (7 L.D. 1); overruled so far as in conflict, 29 L.D. 698 (1900).

Hardee *v.* United States (8 L.D. 391; 16 L.D. 499); overruled so far as in conflict, 29 L.D. 698 (1900).

Hardin, James A. (10 L.D. 313); revoked, 14 L.D. 233 (1892).

Harris, James G. (28 L.D. 90); overruled, 39 L.D. 93 (1910).

Harrison, W. R. (19 L.D. 299); overruled, 33 L.D. 539 (1905).

Hart *v.* Cox (42 L.D. 592); vacated, 260 U.S. 427 (See 49 L.D. 413 (1923)).

Hastings and Dakota Ry. Co. *v.* Christenson (22 L.D. 257); overruled, 28 L.D. 572 (1899).

Hausman, Peter A. C. (37 L.D. 352); modified, 48 L.D. 629 (1922).

Hayden *v.* Jamison (24 L.D. 403); vacated, 26 L.D. 373 (1898).

Haynes *v.* Smith (50 L.D. 208); overruled so far as in conflict, 54 I.D. 150 (1933).

Heilman *v.* Syverson (15 L.D. 184); overruled, 23 L.D. 119 (1896).

Heinzman *v.* Letroadec's Heirs (28 L.D. 497); overruled, 38 L.D. 253 (1909).

Heirs of Davis (40 L.D. 573); overruled, 46 L.D. 110 (1917).

Heirs of Mulnix, Philip (33 L.D. 331); overruled, 43 L.D. 532 (1915).

Heirs of Stevenson *v.* Cunningham (32 L.D. 650); overruled so far as in conflict, 41 L.D. 119 (1912) (See 43 L.D. 196).

Heirs of Talkington *v.* Hempfling (2 L.D. 46); overruled, 14 L.D. 200 (1892).

Heirs of Vradenburg *v.* Orr (25 L.D. 323); overruled, 38 L.D. 253 (1909).

Helmer, Inkerman (34 L.D. 341); modified, 42 L.D. 472 (1913).

Helphrey *v.* Coil (49 L.D. 624); overruled, Dennis *v.* Jean (A-20899), July 24, 1937, unreported.

Henderson, John W. (40 L.D. 518); vacated, 43 L.D. 106 (1914) (See 44 L.D. 112 and 49 L.D. 484).

ennig, Nellie J. (38 L.D. 443, 445); recalled and vacated, 39 L.D. 211 (1910).

ensel, Ohmer V. (45 L.D. 557); distinguished, 66 I.D. 275 (1959).

erman *v.* Chase (37 L.D. 590); overruled, 43 L.D. 246 (1914).

errick, Wallace H. (24 L.D. 23); overruled, 25 L.D. 113 (1897).

ickey, M. A. (3 L.D. 83); modified, 5 L.D. 256.

ildreth, Henry (45 L.D. 464); vacated, 46 L.D. 17 (1917).

indman, Ada I. (42 L.D. 327); vacated in part, 43 L.D. 191 (1914).

oglund, Svan (42 L.D. 405); vacated, 43 L.D. 538 (1914).

olbeck, Halvor F., A-30376 (Dec. 2, 1965); overruled, 79 I.D. 416 (1972).

olden, Thomas A. (16 L.D. 493); overruled, 29 L.D. 166 (1899).

olland, G. W. (6 L.D. 20); overruled, 6 L.D. 639; 12 L.D. 433, 436 (1891).

Holland, William C. (M-27696); decided Apr. 26, 1934; overruled in part, 5 I.D. 215, 221 (1935).

Hollensteiner, Walter (38 L.D. 319); overruled, 47 L.D. 260 (1919).

Holman *v.* Central Montana Mines Co. (34 L.D. 568); overruled so far as in conflict, 47 L.D. 590 (1920).

Hon *v.* Martinas (41 L.D. 119); modified, 43 L.D. 196, 197 (1914).

Hooper, Henry (6 L.D. 624); modified, 9 L.D. 86, 284 (1899).

Howard *v.* Northern Pacific R.R. Co. (23 L.D. 6); overruled, 28 L.D. 126 (1899).

Howard, Thomas (3 L.D. 409) (See 39 L.D. 162, 225 (1910)).

Howell, John H. (24 L.D. 35); overruled, 28 L.D. 204 (1899).

Howell, L. C. (39 L.D. 92); in effect overruled (See 39 L.D. 411 (1910)).

Hoy, Assignee of Hess (46 L.D. 421); overruled, 51 L.D. 287 (1925).

Hughes *v.* Greathead (43 L.D. 497); overruled, 49 L.D. 413 (1923) (See 260 U.S. 427).

Hull *v.* Ingle (24 L.D. 214); overruled, 30 L.D. 258 (1900).

Huls, Clara (9 L.D. 401); modified, 21 L.D. 377 (1895).

Humble Oil & Refining Co. (64 I.D. 5); distinguished, 65 I.D. 316 (1958).

Hunter, Charles H. (60 I.D. 395); distinguished, 63 I.D. 65 (1956).

Hurley, Bertha C. (TA-66 (Ir.)), Mar. 21, 1952, unreported; overruled, 62 I.D. 12 (1955).

Hyde, F. A. (27 L.D. 472); vacated, 28 L.D. 284 (1899).

Hyde, F. A. (40 L.D. 284); overruled, 43 L.D. 381 (1914).

Hyde *v.* Warren (14 L.D. 576, 15 L.D. 415) (See 19 L.D. 64 (1894)).

Ingram, John D. (37 L.D. 475) (See 43 L.D. 544 (1914)).

Inman *v.* Northern Pacific R.R. Co. (24 L.D. 318); overruled, 28 L.D. 95 (1899).

Instructions (4 L.D. 297); modified, 24 L.D. 45 (1897).

Instructions (32 L.D. 604); overruled so far as in conflict, 50 L.D. 628; 53 I.D. 365; Lillian M. Peterson (A–20411), Aug. 5, 1937, unreported (See 59 I.D. 282, 286).

Instructions (51 L.D. 51); overruled so far as in conflict, 54 I.D. 36 (1932).

Interstate Oil Corp. & Frank O. Chittenden (50 L.D. 262); overruled so far as in conflict, 53 I.D. 228 (1930).

Iowa Railroad Land Co. (23 L.D. 79); (24 L.D. 125); vacated, 29 L.D; (1899).

Jacks *v.* Belard (29 L.D. 369); vacated, 30 L.D. 345 (1900).

Johnson *v.* South Dakota (17 L.D. 411); overruled so far as in conflict, 41 L.D. 21, 22 (1912).

Jones, James A. (3 L.D. 176); overruled, 8 L.D. 448 (1889).

Jones *v.* Kennett (6 L.D. 688); overruled, 14 L.D. 429 (1892).

Kackmann, Peter (1 L.D. 86); overruled, 16 L.D. 463, 464 (1893).

Kanawha Oil & Gas Co., Assignee (50 L.D. 639); overruled so far as in conflict, 54 I.D. 371 (1934).

Keating Gold Mining Co., Montana Power Co., Transferee, 52 L.D. 671 (1929), overruled in part, Arizona Public Service Co., 5 IBLA 137, 79 I.D. 67 (1972).

Kemp, Frank A. (47 L.D. 560); overruled so far as in conflict, 60 I.D. 417, 419 (1950).

Kemper *v.* St. Paul & Pacific R.R. Co. (2 C.L.L. 805); overruled, 18 L.D. 101 (1894).

Kilner, Harold E. (A-21845); Feb. 1, 1939, unreported; overruled so far as in conflict, 59 I.D. 258, 260 (1946).

King *v.* Eastern Oregon Land Co. (23 L.D. 579); modified, 30 L.D. 19 (1900).

Kinney, E.C. (44 L.D. 580); overruled so far as in conflict, 53 I.D. 228 (1930).

Kinsinger *v.* Peck (11 L.D. 202) (See 39 L.D. 162, 225 (1910)).

Kiser *v.* Keech (7 L.D. 25); overruled, 23 L.D. 119 (1896).

Knight, Albert B. (30 L.D. 227); overruled, 31 L.D. 64 (1901).

Knight *v.* Heirs of Knight (39 L.D. 362, 491); 40 L.D. 461; overruled, 43 L.D. 242 (1914).

Kniskern *v.* Hastings & Dakota R.R. Co. (6 C.L.O. 50); overruled, 1 L.D. 362 (1883).

Kolberg, Peter F. (37 L.D. 453); overruled, 43 L.D. 181 (1914).

Krighaum, James T. (12 L.D. 617); overruled, 26 L.D. 448 (1898).

Krushnic, Emil L. (52 L.D. 282, 295); vacated, 53 I.D. 42, 45 (1930) (See 280 U.S. 306).

Lackawanna Placer Claim (36 L.D. 36); overruled, 37 L.D. 715 (1909).

La Follette, Harvey M. (26 L.D. 453); overruled so far as in conflict, 59 I.D. 416, 422 (1947).

Lamb *v.* Ullery (10 L.D. 528); overruled, 32 L.D. 331 (1903).

Largent, Edward B. (13 L.D. 397); overruled so far as in conflict, 42 L.D. 321 (1913).

Larson, Syvert (40 L.D. 69); overruled, 43 L.D. 242 (1914).

Lasselle *v.* Missouri, Kansas & Texas Ry. Co. (3 C.L.O. 10); overruled, 14 L.D. 278 (1892).

Las Vegas Grant (13 L.D. 646; 15 L.D. 58); revoked, 27 L.D. 683 (1898).

Laughlin, Allen (31 L.D. 256); overruled, 41 L.D. 361 (1912).

Laughlin *v.* Martin (18 L.D. 112); modified, 21 L.D. 40 (1895).

Law *v.* State of Utah (29 L.D. 623); overruled, 47 L.D. 359 (1920).

Layne & Bowler Export Corp., IBCA-245 (Jan. 18, 1961), 68 I.D. 33, overruled insofar as it conflicts with Schweigert, Inc. *v.* United States, Court of Claims, No. 26–66 (Dec. 15, 1967), and Galland-Henning Manufacturing Company, IBCA–534–12–65 (Mar. 29, 1968).

Lemmons, Lawson H. (19 L.D. 37); overruled, 26 L.D. 389 (1898).

Leonard, Sarah (1 L.D. 41); overruled, 16 L.D. 463, 464 (1893).

Liability of Indian Tribes for State Taxes Imposed on Royalty Received from Oil and Gas Leases, 58 I.D. 535 (1943); superseded to extent it is inconsistent with Solicitor's Opinion—Tax Status of the Production of Oil and Gas from Leases of the Ft. Peck Tribal Lands Under the 1938 Mineral Leasing Act, M-36896, 84 I.D. 905 (1977).

Lindberg, Anna C. (3 L.D. 95); modified, 4 L.D. 299 (1885).

Linderman *v.* Wait (6 L.D. 689); overruled, 13 L.D. 459 (1891).

Linhart *v.* Santa Fe Pacific R.R. Co. (36 L.D. 41); overruled, 41 L.D. 284 (See 43 L.D. 536 (1914)).

Liss, Merwin E., Cumberland & Allegheny Gas Co., 67 I.D. 385 (1960), is overruled, 80 I.D. 395 (1973).

Little Pet Lode (4 L.D. 17); overruled, 25 L.D. 550 (1897).

Lock Lode (6 L.D. 105); overruled so far as in conflict, 26 L.D. 123 (1898).

Lockwood, Francis A. (20 L.D. 361); modified, 21 L.D. 200 (1895).

Lonergan *v.* Shockley (33 L.D. 238); overruled so far as in conflict, 34 L.D. 314; 36 L.D. 199 (1907).

Louisiana, State of (8 L.D. 126); modified, 9 L.D. 157 (1889).

Louisiana, State of (24 L.D. 231); vacated, 26 L.D. 5 (1898).

Louisiana, State of (47 L.D. 366); overruled so far as in conflict, 51 L.D. 291 (1925).

Louisiana, State of (48 L.D. 201); overruled so far as in conflict, 51 L.D. 291 (1925).

ucy B. Hussey Lode (5 L.D. 93); overruled, 25 L.D. 495 (1897).

use, Jeanette L. (61 I.D. 103); distinguished by Richfield Oil Corp., 71 I.D. 243 (1964).

uton, James W. (34 L.D. 468); overruled so far as in conflict, 35 L.D. 102 (1906).

yman, Mary O. (24 L.D. 493); overruled so far as in conflict, 43 L.D. 221 (1914).

ynch, Patrick (7 L.D. 33); overruled so far as in conflict, 13 L.D. 713 (1891).

Mabel Lode, 26 L.D. 675 distinguished; 57 I.D. 63 (1939).

Madigan, Thomas (8 L.D. 188); overruled, 27 L.D. 448 (1898).

Maginnis, Charles P. (31 L.D. 222); overruled, 35 L.D. 399 (1907).

Maginnis, John S. (32 L.D. 14); modified (42 L.D. 472 (1913)).

Maher, John M. (34 L.D. 342); modified, 42 L.D. 472 (1913).

Mahoney, Timothy (41 L.D. 129); overruled, 42 L.D. 313 (1913).

Makela, Charles (46 L.D. 509); extended, 49 L.D. 244 (1922).

Makemson *v.* Snider's Heirs (22 L.D. 511); overruled, 32 L.D. 650 (1904).

Malone Land & Water Co. (41 L.D. 138); overruled in part, 43 L.D. 110 (1914).

Maney, John J. (35 L.D. 250); modified, 48 L.D. 153 (1921).

Maple, Frank (37 L.D. 107); overruled, 43 L.D. 181 (1914).

Martin *v.* Patrick (41 L.D. 284); overruled, 43 L.D. 536 (1914).

Mason *v.* Cromwell (24 L.D. 248); vacated, 26 L.D. 368 (1898).

Masten, E. C. (22 L.D. 337); overruled, 25 L.D. 111 (1897).

Mather *v.* Hackley's Heirs (15 L.D. 487); vacated, 19 L.D. 48 (1894).

Maughan, George W. (1 L.D. 25); overruled, 7 L.D. 94 (1888).

Maxwell and Sangre de Cristo Land Grants (46 L.D. 301); modified, 48 L.D. 87, 88 (1921).

McBride *v.* Secretary of the Interior (8 C.L.O. 10); modified, 52 L.D. 33 (1927).

McCalla *v.* Acker (29 L.D. 203); vacated, 30 L.D. 277 (1900).

McCord, W. E. (23 L.D. 137); overruled to extent of any possible inconsistency, 56 I.D. 73 (1937).

McCornick, Williams S. (41 L.D. 661, 666); vacated, 43 L.D. 429 (1914).

McCraney *v.* Heirs of Hayes (33 L.D. 21); overruled so far as in conflict, 41 L.D. 119 (1912) (See 43 L.D. 196).

McDonald, Roy (34 L.D. 21); overruled, 37 L.D. 285 (1908).

McDonogh School Fund (11 L.D. 378); overruled, 30 L.D. 616 (1901) (See 35 L.D. 399).

McFadden *v.* Mountain View Mining & Milling Co. (26 L.D. 530); vacated, 27 L.D. 358 (1898).

McGee, Edward D. (17 L.D. 285); overruled, 29 L.D. 166 (1899).

McGrann, Owen (5 L.D. 10); overruled, 24 L.D. 502 (1897).

McGregor, Carl (37 L.D. 693); overruled, 38 L.D. 148 (1909).

McHarry *v.* Stewart (9 L.D. 344); criticized and distinguished, 56 I.D. 340 (1938).

McKernan *v.* Bailey (16 L.D. 368); overruled, 17 L.D. 494 (1893).

McKittrick Oil Co. *v.* Southern Pacific R.R. Co. (37 L.D. 243); overruled so far as in conflict, 40 L.D. 528 (See 42 L.D. 317 (1913)).

McMicken, Herbert (10 L.D. 97); (11 L.D.96), distinguished, 58 I.D. 257, 260 (1942).

McNamara *v.* State of California (17 L.D. 296); overruled, 22 L.D. 666 (1896).

McPeek *v.* Sullivan (25 L.D. 281); overruled, 36 L.D. 26 (1907).

Mead, Robert E., 62 I.D. 111 (1955); overruled, Jones-O'Brien, Inc., 1 Sec 13, 85 I.D. 89 (1978).

Mee *v.* Hughart (23 L.D. 455); vacated, 28 L.D. 209. In effect reinstated, 44 L.D. 414, 487, 46 L.D. 434; 48 L.D. 195, 346, 348; 49 L.D. 659, 660 (1923).

Meeboer *v.* Heirs of Schut (35 L.D. 335); overruled so far as in conflict, 41 L.D. 119 (1912) (See 43 L.D. 196).

Mercer *v.* Buford Townsite (35 L.D. 119); overruled, 35 L.D. 649 (1907).

Meyer *v.* Brown (15 L.D. 307) (See 39 L.D. 162, 225 (1910)).

Meyer, Peter (6 L.D. 639); modified, 12 L.D. 436 (1891).

Midland Oilfields Co. (50 L.D. 620); overruled so far as in conflict, 54 I.D. 371 (1934).

Mikesell, Henry D., A-24112 (Mar. 11, 1946); *rehearing denied* (June 20, 1946), overruled to extent inconsistent, 70 I.D. 149 (1963).

Miller, D., 60 I.D. 161; overruled in part, 62 I.D. 210.

Miller, Duncan, A-29760 (Sept. 18, 1963), overruled, 79 I.D. 416 (1972).

Miller, Duncan, A-30742 (Dec. 2, 1966), overruled. 79 I.D. 416 (1972).

Miller, Duncan, A-30722 (Apr. 14, 1967), overruled, 79 I.D. 416 (1972).

Miller, Duncan, 6 IBLA 283 (1972); overruled to extent inconsistent, Jones-O'Brien, Inc., 1 Sec 13, 85 I.D. 89 (1978).

Miller, Edwin J. (35 L.D. 411); overruled, 43 L.D. 181 (1914).

Miller *v.* Sebastian (19 L.D. 288); overruled, 26 L.D. 448 (1898).

Milner & North Side R.R. Co. (36 L.D. 488); overruled, 40 L.D. 187.

Milton *v.* Lamb (22 L.D. 339); overruled, 25 L.D. 550 (1897).

Milwaukee, Lake Shore & Western Ry. Co. (12 L.D. 79); overruled, 29 L.D. 112 (1899).

Miner *v.* Mariott (2 L.D. 709); modified, 28 L.D. 224 (1899).

Minnesota & Ontario Bridge Co. (30 L.D. 77); no longer followed, 50 L.D. 359 (1924).

Mitchell *v.* Brown (3 L.D. 65); overruled, 41 L.D. 396 (1912) (See 43 L.D. 520).

Monitor Lode (18 L.D. 358); overruled, 25 L.D. 495 (1897).

Monster Lode (35 L.D. 493); overruled so far as in conflict, 55 I.D. 348 (1935).

Moore, Charles H. (16 L.D. 204); overruled, 27 L.D. 481-2 (1898).

Morgan *v.* Craig (10 C.L.O. 234); overruled, 5 L.D. 303 (1886).

Morgan, Henry S., 65 I.D. 369; overruled to extent inconsistent, 71 I.D. 22 (1964).

Morgan *v.* Rowland (37 L.D. 90); overruled, 37 L.D. 618 (1909).

Moritz *v.* Hinz (36 L.D. 450); vacated, 37 L.D. 382 (1909).

Morrison, Charles S. (36 L.D. 126); modified, 36 L.D. 319 (1908).

Morrow *v.* State of Oregon *et al.* (32 L.D. 54); modified, 33 L.D. 101 (1904).

Moses, Zelmer R. (36 L.D. 473); overruled, 44 L.D. 570.

Mountain Chief Nos. 8 and 9 Lode Claims (36 L.D. 100); overruled in part, 36 L.D. 551 (1908).

Mountain Fuel Supply Co., A–31053 (Dec. 19, 1969); overruled, 79 I.D. 416 (1972).

Mt. Whitney Military Reservation (40 L.D. 315 (1911)) (See 43 L.D. 33).

Muller, Ernest (46 L.D. 243); overruled, 48 L.D. 163 (1921).

Muller, Esberne K. (39 L.D. 72); modified, 39 L.D. 360 (1910).

Mulnix, Philip, Heirs of (33 L.D. 331); overruled, 43 L.D. 532 (1915).

Munsey, Glenn, Earnest Scott and Arnold Scott *v.* Smitty Baker Coal Co., Inc., 1 IBMA 144, 162 (Aug. 8, 1972), 79 I.D. 501, 509, distinguished, 80 I.D. 251 (1973).

Myll, Clifton O., 71 I.D. 458 (1964); as supplemented, 71 I.D. 486 (1964), vacated, 72 I.D. 536 (1965).

National Livestock Co. and Zack Cox, I.G.D. 55 (1938), is overruled, United States *v.* Maher, Charles, 5 IBLA 209, 79 I.D. 109 (1972).

Naughton, Harold J., 3 IBLA 237, 78 I.D. 300 (1971); Schweite, Helena M., 14 IBLA 305 (Feb. 1, 1974) is distinguished by Kristeen J. Burke, Joe N. Melovedoff, Victor Melovedoff, 20 IBLA 162 (May 5, 1975).

Nebraska, State of (18 L.D. 124); overruled, 28 L.D. 358 (1899).

Nebraska, State of *v.* Dorrington (2 C.L.L. 647); overruled, 26 L.D. 123 (1898).

Neilsen *v.* Central Pacific R.R. Co. (26 L.D. 252); modified, 30 L.D. 216 (1900).

Newbanks *v.* Thompson (22 L.D. 490); overruled, 29 L.D. 108 (1899).

Newlon, Robert C. (41 L.D. 421); overruled so far as in conflict, 43 L.D. 364 (1914).

New Mexico, State of (46 L.D. 217); overruled, 48 L.D. 97 (1921).

New Mexico, State of (49 L.D. 314); overruled, 54 I.D. 159 (1933).

Newton, Walter (22 L.D. 322); modified, 25 L.D. 188 (1897).

New York Lode & Mill Site (5 L.D. 513); overruled, 27 L.D. 373 (1898).

Nickel, John R. (9 L.D. 388); overruled, 41 L.D. 129 (1912) (See 42 L.D. 313).

Northern Pacific R.R. Co. (20 L.D. 191); modified, 22 L.D. 234; overruled so far as in conflict, 29 L.D. 550 (1900).

Northern Pacific R.R. Co. (21 L.D. 412, 23 L.D. 204; 25 L.D. 501); overruled, 53 I.D. 242 (See 26 L.D. 265; 33 L.D. 426; 44 L.D. 218 (1915); 117 U.S. 435).

Northern Pacific R.R. Co. *v.* Bowman (7 L.D. 238); modified, 18 L.D. 224 (1894).

Northern Pacific R.R. Co. *v.* Burns (6 L.D. 21); overruled, 20 L.D. 191 (1895).

Northern Pacific R.R. Co. *v.* Loomis (21 L.D. 395); overruled, 27 L.D. 464 (1898).

Northern Pacific R.R. Co. *v.* Marshall (17 L.D. 545); overruled, 28 L.D. 174 (1899).

Northern Pacific R.R. Co. *v.* Miller (7 L.D. 100); overruled so far as in conflict, 16 L.D. 229 (1893).

Northern Pacific R.R. Co. *v.* Sherwood (28 L.D. 126); overruled so far as in conflict, 29 L.D. 550 (1900).

Northern Pacific R.R. Co. *v.* Symons (22 L.D. 686); overruled, 28 L.D. 95 (1899).

Northern Pacific R.R. Co. *v.* Urquhart (8 L.D. 365); overruled, 28 L.D. 126 (1899).

Northern Pacific R.R. Co. *v.* Walters (13 L.D. 230); overruled so far as in conflict, 49 L.D. 391 (1922).

Northern Pacific R.R. Co. *v.* Yantis (8 L.D. 58); overruled, 12 L.D. 127 (1891).

Northern Pacific Ry. Co. (48 L.D. 573); overruled so far as in conflict, 51 L.D. 196 (1925) (See 52 L.D. 58 (1927)).

Nunez, Roman C. & Serapio (56 I.D. 363); overruled so far as in conflict, 57 I.D. 213.

Nyman *v.* St. Paul, Minneapolis, & Manitoba Ry. Co. (5 L.D. 396); overruled, 6 L.D. 750 (1888).

O'Donnell, Thomas J. (28 L.D. 214); overruled, 35 L.D. 411 (1907).

Oil and Gas Privilege and License Tax, Ft. Peck Reservation, Under Laws of Montana, M-36318 (Oct. 13, 1955); is *superseded* to the extent that it is *inconsistent* with, Solicitor's Opinion—Tax Status of the Production of Oil and Gas From Lease of the Ft. Peck Tribal Lands Under the 1938 Mineral Leasing Act, M-36896, 84 I.D. 905 (1977).

Olson *v.* Traver *et al.* (26 L.D. 350, 628); overruled so far as in conflict, 29 L.D. 480; 30 L.D. 382 (1900).

Opinion A.A.G. (35 L.D. 277); vacated, 36 L.D. 342 (1908).

Opinion of Acting Solicitor, June 6, 1941; overruled so far as inconsistent, 60 I.D. 333 (1949).

Opinion of Acting Solicitor, July 30, 1942; overruled so far as in conflict, 58 I.D. 331 (1943) (See 59 I.D. 346, 350).

Opinion of Associate Solicitor, Oct. 22, 1947 (M-34999); distinguished, 68 I.D. 433 (1961).

Opinion of Associate Solicitor, M-36463, 64 I.D. 351 (1957); overruled, 74 I.D. 165 (1967).

Opinion of Associate Solicitor, M-36512 (July 29, 1958); overruled to extent inconsistent, 70 I.D. 159 (1963).

Opinion of Chief Counsel, July 1, 1914 (43 L.D. 339); explained, 68 I.D. 372 (1961).

Opinion of Deputy Assistant Secretary (Dec. 2, 1966), affirming Oct. 27, 1966, is *superseded* to the extent that it is *inconsistent* with Solicitor's Opinion—Tax Status of the Production of Oil and Gas From Leases of the Ft. Peck Tribal Lands Under the 1938 Mineral Leasing Act. M-36896, 84 I.D. 905 (1977).

Opinion of Deputy Solicitor—M-36562 Aug. 21, 1959 (unpublished)—overruled by Solicitor's Opinion—M-36911, 86 I.D. 151 (1979)—Effect of Public Land Order 82 on the Ownership of Coastal Submerged Lands in Northern Alaska.

Opinion of Secretary, 75 I.D. 147 (1968); vacated, 76 I.D. 69 (1969).

Opinion of Solicitor, Oct. 31, 1917 (D-40462); overruled so far as inconsistent, 58 I.D. 85, 92, 96 (1942).

Opinion of Solicitor, Feb. 7, 1919 (D-44083); overruled, Nov. 4, 1921 (M-6397) (See 58 I.D. 158, 160 (1942)).

Opinion of Solicitor, Aug. 8, 1933 (M-27499); overruled so far as in conflict, 54 I.D. 402 (1934).

Opinion of Solicitor, June 15, 1934, (54 I.D. 517 (1934)); overruled in part, Feb. 11, 1957 (M-36410).

Opinion of Solicitor, Oct. 25, 1934, 55 I.D. 14, overruled so far as inconsistent, 77 I.D. 49 (1970).

Opinion of Solicitor—55 I.D. 466 (1936)—State of New Mexico, overruled to extent it applies to 1926 Executive Order to artifically developed water sources on public lands, by Solicitor's Opinion—M-36914, 86 I.D. 553 (1979)—Federal Water Rights of the National Park Service, Fish & Wildlife Service, Bureau of Reclamation and Bureau of Land Management.

Opinion of Solicitor—M-28198, Jan. 8, 1936, finding, *inter alia*, that Indian title to certain lands within the Fort Yuma Reservation has been extinguished, is well founded and is affirmed by Solicitor's Opinion—M-36886, 84 I.D. 1 (1977)—Title to Certain Lands Within the Boundaries of the Ft. Yuma Indian Reservation as Established by the Executive Order of Jan. 9, 1885—but overruled by Solicitor's Opinion—M-36908, 86 I.D. 3 (1979)—Title to Certain Lands Within the Boundaries of the Fort Yuma (Now Called Quechan) Indian Reservation.

Opinion of Solicitor, May 8, 1940 (57 I.D. 124); overruled in part, 58 I.D. 562, 567 (1943).

Opinion of Solicitor, Aug. 31, 1943 (M-33183), distinguished, 58 I.D. 726, 729 (1944).

Opinion of Solicitor, May 2, 1944 (58 I.D. 680); distinguished, 64 I.D. 141.

Opinion of Solicitor, M-34326, 59 I.D. 147 (1945); overruled in part, Solicitor's Opinion, M-36887, 84 I.D. 72 (1977).

Opinion of Solicitor, Oct. 22, 1947 (M-34999); distinguished, 68 I.D. 433 (1961).

Opinion of Solicitor, Mar. 28, 1949 (M-35093); overruled in part, 64 I.D. 70 (1957).

Opinion of the Solicitor, 60 I.D. 436 (1950); will not be followed to the extent that it conflicts with these views, 72 I.D. 92 (1965).

Opinion of Solicitor, M-36051 (Dec. 7, 1950), modified; Solicitor's Opinion, M-36863, 79 I.D. 513 (1972).

Opinion of Solicitor, M-36241 (Sept. 22, 1954), overruled as far as inconsistent with,—Criminal Jurisdiction on Seminole Reservations in Fla., M-36907, 85 I.D. 433 (1978).

Opinion of Solicitor, Jan. 19, 1956 (M-36378); overruled to extent inconsistent, 64 I.D. 57 (1957).

Opinion of Solicitor, June 4, 1957 (M-36443); overruled in part, 65 I.D. 316 (1958).

Opinion of Solicitor, July 9, 1957 (M-36442); withdrawn and superseded, 65 I.D. 386, 388 (1958).

Opinion of Solicitor, Oct. 30, 1957, 64 I.D. 393 (M-36429); no longer followed, 67 I.D. 366 (1960).

Opinion of Solicitor, 64 I.D. 351 (1957); overruled, M-36706, 74 I.D. 165 (1967).

Opinion of Solicitor, 64 I.D. 435 (1957); will not be followed to the extent that it conflicts with these views, M-36456 (Supp.) (Feb. 18, 1969), 76 I.D. 14 (1969).

Opinion of Solicitor, July 29, 1958 (M-36512); overruled to extent inconsistent, 70 I.D. 159 (1963).

Opinion of Solicitor, Oct. 27, 1958 (M-36531); overruled, 69 I.D. 110 (1962).

Opinion of Solicitor, July 20, 1959 (M-36531, Supp.); overruled, 69 I.D. 110 (1962).

Opinion of Solicitor, Aug. 26, 1959 (M-36575); affirmed in pertinent part by Solicitor's Opinion, M-36921, 87 I.D. 291 (1980).

Opinion of Solicitor, 68 I.D. 433 (1961); distinguished and limited, 72 I.D. 245 (1965).

Opinion of Solicitor, M-36767 (Nov. 1, 1967) (supplementing, M-36599), 69 I.D. 195 (1962).

Opinion of Solicitor, M-36735 (Jan. 31, 1968), is reversed and withdrawn, Relocation of Flathead Irrigation Project's Kerr Substation and Switchyard, M-36735 (Supp.), 83 I.D. 346 (1976).

Opinion of Solicitor—M-36779 (Nov. 17, 1969), Appeals of Freeport Sulphur Co. & Texas Gulf Sulphur Co., distinguished with respect to applicability of exemptions (4) & (9) of FOIA to present value estimates and overruled with respect to applicability of exemption (5) of FOIA to presale estimates, Solicitor's Opinion—M-36918, 86 I.D. 661 (1979).

Opinion of Solicitor—M-36841 (Nov. 9, 1971), Appeal of Amoco Production Co., distinguished with respect to applicability of exemptions (4) & (9) of FOIA to the present value estimates and overruled with respect to applicability of exemption (5) of FOIA to presale estimates, Solicitor's Opinion—M-36918, 86 I.D 661 (1979).

Opinion of Solicitor—M-36886, 84 I.D. 1 (1977)—Title to Certain Lands Within Boundaries of Ft. Yuma Indian Reservation as Established by Exec. Order of Jan. 9, 1885 is overruled by Solicitor's Opinion—M-36908, 86 I.D. 3 (1979)—Title to Certain Lands Within the Boundaries of the Ft. Yuma (Now Called Quechan) Indian Reservation.

Opinions of Solicitor, Sept. 15, 1914, and Feb. 2, 1915; overruled, Sept. 9, 1919 (D-43035, May Caramony) (See 58 I.D. 149, 154-156 (1942)).

Oregon and California R.R. Co. *v.* Puckett (39 L.D. 169); modified, 53 I.D. 264 (1931).

Oregon Central Military Wagon Road Co. *v.* Hart (17 L.D. 480); overruled, 18 L.D. 543 (1894).

Owens *v.* State of California (22 L.D. 369; overruled, 38 L.D. 253 (1909).

Pace *v.* Carstarphen (50 L.D. 369); distinguished, 61 I.D. 459 (1954).

Pacific Slope Lode (12 L.D. 686); overruled so far as in conflict, 25 L.D. 518 (1897).

Page, Ralph, 8 IBLA 435 (Dec. 22, 1972), explained; Sam Rosetti, 15 IBLA 288, 81 I.D. 251 (1974).

Papina *v.* Alderson (1 B.L.P. 91); modified, 5 L.D. 256 (1886).

Patterson, Charles E. (3 L.D. 260); modified, 6 L.D. 284 & 624.

Paul Jarvis, Inc., Appeal of (64 I.D. 285); distinguished, 64 I.D. 388 (1957).

Paul Jones Lode (28 L.D. 120); modified, 31 L.D. 359 overruled, 57 I.D. 63 (1939).

Paul *v.* Wiseman (21 L.D. 12); overruled, 27 L.D. 522 (1898).

Pecos Irrigation and Improvement Co. (15 L.D. 470); overruled, 18 L.D. 168, 268 (1894).

Pennock, Belle L. (42 L.D. 315); vacated, 43 L.D. 66 (1914).

Perry *v.* Central Pacific R.R. Co. (39 L.D. 5); overruled so far as in conflict, 47 L.D. 303, 304 (1920).

Phebus, Clayton (48 L.D. 128); overruled so far as in conflict, 50 L.D. 281; overruled to extent inconsistent, 70 I.D. 159 (1963).

Phelps, W. L. (8 C.L.O. 139); overruled, 2 L.D. 854 (1884).

Phillips, Alonzo (2 L.D. 321); overruled, 15 L.D. 424 (1892).

Phillips *v.* Breazeale's Heirs (19 L.D. 573); overruled, 39 L.D. 93 (1910).

Phillips, Cecil H., A-30851 (Nov. 16, 1967); overruled, 79 I.D. 416 (1972).

Phillips, Vance W., 14 IBLA 79 (Dec. 11
1973) is modified by Vance W
Phillips and Aelisa A. Burnham, 1
IBLA 211 (Mar. 21, 1975).

Pieper, Agnes C. (35 L.D. 459); overruled, 43 L.D. 374 (1914).

Pierce, Lewis W. (18 L.D. 328); vacated, 53 I.D. 447; overruled so fa
as in conflict, 59 I.D. 416, 42
(1947).

Pietkiewicz *v.* Richmond (29 L.D. 195)
overruled, 37 L.D. 145 (1908).

Pike's Peak Lode (10 L.D. 200); overruled in part, 20 L.D. 204, 48 L.D
523 (1922).

Pike's Peak Lode (14 L.D. 47); overruled, 20 L.D. 204, 48 L.D. 52
(1922).

Popple, James (12 L.D. 433); overruled, 13 L.D. 588 (1891).

Powell, D. C. (6 L.D. 302); modifie
15 L.D. 477 (1892).

Prange, Christ C. & William C. Braasc
(48 L.D. 488); overruled so far as i
conflict, 60 I.D. 417, 419 (1950).

Premo, George (9 L.D. 70) (See 39 L.D
162, 225 (1910)).

Prescott, Henrietta P. (46 L.D. 486)
overruled, 51 L.D. 287 (1925).

Pringle, Wesley (13 L.D. 519); overruled, 29 L.D. 599 (1900).

Provensal, Victor H. (30 L.D. 616)
overruled, 35 L.D. 399 (1907).

Prue, Widow of Emanuel (6 L.D. 436)
vacated, 33 L.D. 409 (1905).

Pugh, F. M. (14 L.D. 274); in effec
vacated, 232 U.S. 452.

Puyallup Allotment (20 L.D. 157)
modified, 29 L.D. 628 (1900).

Ramsey, George L., Heirs of Edwin C
Philbrick (A-16060), Aug. 6, 1931, unreported; recalled and vacated, 5
I.D. 272, 275, 290 (1942).

Rancho Alisal (1 L.D. 173); overruled
5 L.D. 320 (1866).

Ranger Fuel Corp., 2 IBMA 163 (Jul
17, 1973), 80 I.D. 708; Set aside b
Memorandum Opinion and Orde
Upon Reconsideration in Ranger Fue
Corp., 2 IBMA 186 (Sept. 5, 1973)
80 I.D. 604.

Rankin, James D. (7 L.D. 411); overruled, 35 L.D. 32 (1906).

Rankin, John M. (20 L.D. 272); reversed, 21 L.D. 404 (1895).

Rayburn, Ethel Cowgill, A–28866 (Sept. 6, 1962) is modified by T. T. Cowgill, 19 IBLA 247 (Apr. 6, 1975).

Rebel Lode (12 L.D. 683); overruled, 20 L.D. 204; 48 L.D. 523 (1922).

Reed *v.* Buffington (7 L.D. 154); overruled, 8 L.D. 110 (1889) (See 9 L.D. 360).

Regione *v.* Rosseler (40 L.D. 93); vacated, 40 L.D. 420 (1912).

Reid, Bettie H., Lucille H. Pipkin (61 I.D. 1); overruled, 61 I.D. 355 (1954).

Reliable Coal Corp., 1 IBMA 50, 78 I.D. 199 (1971) distinguished, Zeigler Coal Corp., 1 IBMA 71, 78 I.D. 362 (1971).

Relocation of Flathead Irrigation Project's Kerr Substation and Switchyard, M–36735 (Jan. 31, 1968); is reversed and withdrawn, M–36735 (Supp.) 83 I.D. 346 (1976).

Rialto No. 2 Placer Mining Claim (34 L.D. 44); overruled, 37 L.D. 250 (1908).

Rico Town Site (1 L.D. 556); modified, 5 L.D. 256 (1886).

Rio Verde Canal Co. (26 L.D. 381); vacated, 27 L.D. 421 (1898).

Roberts *v.* Oregon Cental Military Road Co. (19 L.D. 591); overruled, 31 L.D. 174 (1901).

Robinson, Stella G. (12 L.D. 443); overruled, 13 L.D. 1 (1891).

Rogers *v.* Atlantic & Pacific R.R. Co. (6 L.D. 565); overruled so far as in conflict, 8 L.D. 165 (1889).

Rogers, Fred B. (47 L.D. 325); vacated, 53 I.D. 649 (1932).

Rogers, Horace B. (10 L.D. 29); overruled, 14 L.D. 321 (1892).

Rogers *v.* Lukens (6 L.D. 111); overruled, 8 L.D. 110 (1889) (See 9 L.D. 360).

Romero *v.* Widow of Knox (48 L.D. 32); overruled so far as in conflict, 49 L.D. 244 (1922).

Roth Gottlieb (50 L.D. 196); modified, 50 L.D. 197 (1924).

Rough Rider and Other Lode Claims (41 L.D. 242, 255); vacated, 42 L.D. 584 (1913).

St. Clair, Frank (52 L.D. 597); modified, 53 I.D. 194 (1930).

St. Paul Minneapolis & Manitoba Ry. Co. (8 L.D. 255); modified, 13 L.D. 354 (1891) (See 32 L.D. 21).

St. Paul, Minneapolis & Manitoba Ry. Co. *v.* Fogelberg (29 L.D. 291); vacated, 30 L.D. 191 (1900).

St. Paul, Minneapolis & Manitoba Ry. Co. *v.* Hagen (20 L.D. 249); overruled, 25 L.D. 86 (1897).

Salsberry, Carroll (17 L.D. 170); overruled, 39 L.D. 93 (1910).

Sangre de Cristo and Maxwell Land, Grants (46 L.D. 301); modified, 48 L.D. 88 (1921).

Santa Fe Pacific R.R. Co. *v.* Peterson (39 L.D. 442); overruled, 41 L.D. 383 (1912).

Satisfaction Extension Mill Site (14 L.D. 173 (1892)) (See 32 L.D. 128).

Sayles, Henry P. (2 L.D. 88); modified, 6 L.D. 797 (1888) (See 37 L.D. 330).

Schweite, Helena M., 14 IBLA 305 (Feb. 1, 1974); Naughton, Harold J., 3 IBLA 237, 78 I.D. 300 (1971) is distinguished by Kristeen J. Burke, Joe N. Melovedoff, Victor Melovedoff, 20 IBLA 162 (May 5, 1975).

Schweitzer *v.* Hilliard (19 L.D. 294); overrulred so far as in conflict, 26 L.D. 639 (1898).

Serrano *v.* Southern Pacific R.R. Co.(6 C.L.O. 93); overruled, 1 L.D. 380.

Serry, John J. (27 L.D. 330); overruled so far as in conflict, 59 I.D. 416, 422 (1947).

Shale Oil Co., overruled so far as in conflict, (See 55 I.D. 287 (1935)).

Shanley *v.* Moran (1 L.D. 162); overruled, 15 L.D. 424 (1892).

Shillander, H. E., A–30279 (Jan. 26, 1965), overruled, 79 I.D. 416 (1972).

Shineberger, Joseph (8 L.D. 231); overruled, 9 L.D. 202 (1889)).

Silver Queen Lode (16 L.D. 186); overruled, 57 I.D. 63 (1939).

Simpson, Lawrence W. (35 L.D. 399, 609); modified, 36 L.D. 205 (1907).

Simpson, Robert E., A–4167 (June 22, 1970); overruled to extent inconsistent, United States *v.* Union Carbide Corp, 31 IBLA 72, 84 I.D. 309 (1977).

Sipchen *v.* Ross (1 L.D. 634); modified, 4 L.D. 152 (1885).

Smead *v.* Southern Pacific R.R. Co. (21 L.D. 432); vacated, 29 L.D. 135 (1899).

Smith, M. P., 51 L.D. 251 (1925); overruled Solicitor's Opinion, Response to Feb. 17, 1976, Request from the General Accounting Office: Interpretation of Mineral Leasing Act of 1920, and Outer Continental Shelf Lands Act Royalty Clause, M–36888 (Oct. 4, 1976), 84 I.D. 54 (1977).

Snook, Noah A. *et al.* (41 L.D. 428); overruled so far as in conflict, 43 L.D. 364 (1914).

Sorli *v.* Berg (40 L.D. 259); overruled, 42 L.D. 557 (1913).

South Dakota Mining Co. *v.* McDonald, 30 L.D. 357 (1900), distinguished, 28 IBLA 187, 83 I.D. 609 (1976).

Southern Pacific R.R. Co. (15 L.D. 460); reversed, 18 L.D. 275 (1894).

Southern Pacific R.R. Co. (28 L.D. 281); recalled, 32 L.D. 51 (1903).

Southern Pacific R.R. Co. (33 L.D. 89); recalled, 33 L.D. 528 (1905).

Southern Pacific R.R. Co. *v.* Bruns (31 L.D. 272); vacated, 37 L.D. 243 (1908).

South Star Lode (17 L.D. 280); overruled, 20 L.D. 204; 48 L.D. 523 (1922).

Spaulding *v.* Northern Pacific R.R. Co. (21 L.D. 57); overruled, 31 L.D. 151.

Spencer, James (6 L.D. 217); modified, 6 L.D. 772; 8 L.D. 467 (1889).

Sprulli, Leila May (50 L.D. 549); overruled, 52 L.D. 339 (1928).

Standard Oil Co. of Calif. (76 I.D. 271 (1969)), no longer followed, 5 IBLA 26, 79 I.D. 23 (1972).

Standard Oil Co. of Calif. *v.* Morton, 450 F. 2d 493 (9th Cir. 1971); 79 I.D. 29 (1972).

Standard Shales Products Co. (52 L.D. 552); overruled so far as in conflict, 53 I.D. 42 (1930).

Star Gold Mining Co. (47 L.D. 38); distinguished by U.S. *v.* Alaska Empire Gold Mining Co., 71 I.D. 273 (1964).

State of Alaska and Seldovia Native Ass'n., Inc., 2 ANCAB 1, 84 I.D. 349 (1977), modified, Valid Existing Rights under the Alaska Native Claims Settlement Act, Sec. Order No. 3016, 85 I.D. 1 (1978).

State of California (14 L.D. 253); vacated, 23 L.D. 230 (1896). Overruled, 31 L.D. 335 (1902).

State of California (15 L.D. 10); overruled, 23 L.D. 423 (1896).

State of California (19 L.D. 585); vacated, 28 L.D. 57 (1899).

State of California (22 L.D. 428); overruled, 32 L.D. 34 (1903).

State of California (32 L.D. 346); vacated, 50 L.D. 628 (1924) (See 37 L.D. 499 and 46 L.D. 396).

State of California (44 L.D. 118, 468); overruled, 48 L.D. 97 (1921).

State of California *v.* Moccettini (19 L.D. 359); overruled, 31 L.D. 335 (1902).

State of California *v.* Pierce (3 C.L.O. 118); modified, 2 L.D. 854 (1884).

State of California *v.* Smith (5 L.D. 543); overruled so far as in conflict, 18 L.D. 343 (1894).

State of Colorado (7 L.D. 490); overruled, 9 L.D. 408 (1889).

State of Florida (17 L.D. 355); reversed, 19 L.D. 76 (1894).

State of Florida (47 L.D. 92, 93); overruled so far as in conflict, 51 L.D. 291 (1925).

State of Louisiana (8 L.D. 126); modified, 9 L.D. 157 (1889).

State of Louisiana (24 L.D. 231); vacated, 26 L.D. 5 (1898).

State of Louisiana (47 L.D. 366); 48 L.D. 201 overruled so far as in conflict, 51 L.D. 291 (1925).

State of Nebraska (18 L.D. 124); overruled, 28 L.D. 358 (1899).

State of Nebraska *v.* Dorrington (2 C.L.L. 467); overruled so far as in conflict, 26 L.D. 123 (1898).

State of New Mexico (46 L.D. 217); overruled, 48 L.D. 98.

State of New Mexico (49 L.D. 314); overruled, 54 I.D. 159 (1933).

State of Utah (45 L.D. 551); overruled, 48 L.D. 97 (1921).

State Production Taxes on Tribal Royalties from Leases Other than Oil and Gas, M-36345 (May 4, 1956), is *superseded* to the extent that it is *inconsistent* with Solicitor's Opinion—Tax Status of the Production of Oil and Gas from Leases of the Ft. Peck Tribal Lands Under the 1938 Mineral Leasing Act, M-36896, 84 I.D. 905 (1977).

Stevenson, Heirs of *v.* Cunningham (52 L.D. 650); overruled so far as in conflict, 41 L.D. 119 (1912) (See 43 L.D. 196).

Stewart *v.* Rees (21 L.D. 446); overruled so far as in conflict, 29 L.D. 401 (1900).

Stirling, Lillie E. (39 L.D. 346); overruled, 46 L.D. 110 (1917).

Stockley, Thomas J. (44 L.D. 178, 180); vacated, 260 U.S. 532 (See 49 L.D. 460, 461, 492 (1923)).

Strain, A. G. (40 L.D. 108); overruled so far as in conflict, 51 L.D. 51 (1925).

Streit, Arnold (T-476 (Ir.)), Aug. 26, 1952 unreported; overruled, 62 I.D. 12 (1955).

Stricker, Lizzie (15 L.D. 74); overruled so far as in conflict, 18 L.D. 283 (1894).

Stump, Alfred M. (39 L.D. 437); vacated, 42 L.D. 566 (1913).

Sumner *v.* Roberts (23 L.D. 201); overruled so far as in conflict, 41 L.D. 173 (1912).

Superior Oil Co., A-28897 (Sept. 12, 1962) and William Wostenberg, A-26450 (Sept. 5, 1952), distinguished in dictum; 6 IBLA 318, 79 I.D. 439 (1972).

Sweeney *v.* Northern Pacific R.R. Co. (20 L.D. 394); overruled, 28 L.D. 174 (1899).

Sweet, Eri P. (2 C.L.O. 18); overruled, 41 L.D. 129 (1912) (See 42 L.D. 313).

Sweeten *v.* Stevenson (2 B.L.P. 42); overruled so far as in conflict, 3 L.D. 248 (1884).

Taft *v.* Chapin (14 L.D. 593); overruled, 17 L.D. 414, 417 (1893).

Taggart, William M. (41 L.D. 282); overruled, 47 L.D. 370 (1920).

Talkington's Heirs *v.* Hempfling (2 L.D. 46); overruled, 14 L.D. 200 (1892).

Tate, Sarah J. (10 L.D. 469); overruled, 21 L.D. 209, 211 (1895).

Taylor, Josephine (A-21994), June 27, 1939, unreported; overruled so far as in conflict, 59 I.D. 258, 260 (1946).

Taylor *v.* Yates (8 L.D. 279); reversed, 10 L.D. 242 (1890).

Teller, John C. (26 L.D. 484); overruled, 36 L.D. 36 (1907) (See 37 L.D. 715).

Thorstenson, Even (45 L.D. 96); overruled, 36 L.D. 36 (1907) (See 37 L.D. 258 (1919)).

Tieck *v.* McNeil (48 L.D. 158); modified, 49 L.D. 260 (1922).

Toles *v.* Northern Pacific Ry. Co. (39 L.D. 371); overruled so far as in conflict, 45 L.D. 92, 93 (1915).

Tonkins, H. H. (41 L.D. 516); overruled, 51 L.D. 27 (1925).

Traganza, Mertie C. (40 L.D. 300); overruled, 42 L.D. 611, 612 (1913).

Traugh *v.* Ernst (2 L.D. 212); overruled, 3 L.D. 98, 248 (1884).

Tripp *v.* Dunphy (28 L.D. 14); modified, 40 L.D. 128 (1911).

Tripp *v.* Stewart (7 C.L.O. 39); modified, 6 L.D. 795 (1888).

Tucker *v.* Florida Ry. & Nav. Co. (19 L.D. 414); overruled, 25 L.D. 233 (1897).

Tupper *v.* Schwarz (2 L.D. 623); overruled, 6 L.D. 624 (1888).

Turner *v.* Cartwright (17 L.D. 414); modified, 21 L.D. 40 (1895).

Turner *v.* Lang (1 C.L.O. 51); modified, 5 L.D. 256 (1886).

Tyler, Charles (26 L.D. 699); overruled, 35 L.D. 411 (1907).

Ulin *v.* Colby (24 L.D. 311); overruled, 35 L.D. 549 (1907).

Union Pacific R.R. Co. (33 L.D. 89); recalled, 33 L.D. 528 (1905).

U.S. *v.* Barngrover (On Rehearing), 57 I.D. 533 (1942), overruled in part by U.S. *v.* Robinson, Theresa B., 21 IBLA 363, 82 I.D. 414 (1975).

U.S. *v.* Bush (13 L.D. 529); overruled, 18 L.D. 441 (1894).

U.S. *v.* Central Pacific Ry. Co. (52 L.D. 81); modified, 52 L.D. 235 (1927).

U.S. *v.* Dana (18 L.D. 161); modified, 28 L.D. 45 (1899).

U.S. *v.* Kosanke Sand Corp., 3 IBLA 189, 78 I.D. 285 (1971), set aside and case remanded, 12 IBLA 282, 80 I.D. 538 (1973).

U.S. *v.* McClarty, Kenneth, 71 I.D. 331 (1964), vacated and case remanded, 76 I.D. 193 (1969).

U.S. *v.* Melluzzo, Frank & Wanita, A-31042, 76 I.D. 181 (1969); reconsideration, 1 IBLA 37, 77 I.D. 172 (1970).

U.S. *v.* Mouat, M. W. (60 I.D. 473); modified, 61 I.D. 289 (1954).

U.S. *v.* O'Leary, Keith V. (63 I.D. 341); distinguished, 64 I.D. 210 & 369 (1957).

Utah, State of (45 L.D. 551); overruled, 48 L.D. 97 (1921).

Veach, Heir of Natter (46 L.D. 496); overruled so far as in conflict, 49 L.D. 461, 464 (1923) (See 49 L.D. 492 for adherence in part).

Vine, James (14 L.D. 527); modified, 14 L.D. 622 (1892).

Virginia-Colorado Development Corp. (53 I.D. 666); overruled so far as in conflict, 55 I.D. 287, 289 (1935).

Vradenburg's Heirs *v.* Orr (25 L.D. 323); overruled, 38 L.D. 253 (1909).

Wagoner *v.* Hanson (50 L.D. 355); overruled, 56 I.D. 325, 328 (1938).

Wahe, John (41 L.D. 127); modified, 41 L.D. 636, 637 (1913).

Walker *v.* Prosser (17 L.D. 85); reversed, 18 L.D. 425 (1894).

Walker *v.* Southern Pacific R.R. Co (24 L.D. 172); overruled, 28 L.D. 174 (1899).

Wallis, Floyd A. (65 I.D. 369); overruled to the extent that it is inconsistent, 71 I.D. 22 (1963).

Walters, David (15 L.D. 136); revoked, 24 L.D. 58 (1897).

Warren *v.* Northern Pacific R.R. Co. (22 L.D. 568); overruled so far as in conflict 49 L.D. 391 (1922).

Wasmund *v.* Northern Pacific R.R. Co. (23 L.D. 445); vacated, 29 L.D. 224 (1899).

Wass *v.* Milward (5 L.D. 349); no longer followed (See 44 L.D. 72 and unreported case of Ebersold *v.* Dickson, Sept. 25, 1918, D-36502).

Wasserman Jacob N., A-30275 (Sept. 22, 1964), overruled, 79 I.D. 416 (1972).

Waterhouse, William W. (9 L.D. 131); overruled, 18 L.D. 586 (1894).

Watson, Thomas E. (4 L.D. 169); recalled, 6 L.D. 71 (1887).

Weathers, Allen E., Frank N. Hartley (A-25128), May 27, 1949, unreported; overruled in part, 62 I.D. 62 (1955).

Weaver, Francis D. (53 I.D. 179); overruled so far as in conflict, 55 I.D. 287, 290 (1935).

Weber, Peter (7 L.D. 476); overruled, 9 L.D. 150 (1889).

Weisenborn, Ernest (42 L.D. 533); overruled, 43 L.D. 395 (1914).

Werden *v.* Schlecht (20 L.D. 523); overruled so far as in conflict, 24 L.D. 45 (1897).

Western Pacific Ry. Co. (40 L.D. 411; 41 L.D. 599); overruled, 43 L.D. 410 (1914).

Western Slope Gas Co., 40 IBLA 280, reconsideration denied, 48 IBLA 259 (1979), overruled in pertinent part, M-36917, 87 I.D. 27 (1980).

Wheaton *v.* Wallace (24 L.D. 100); modified, 34 L.D. 383 (1906).

Wheeler, William D. (30 L.D. 355); distinguished, and to the extent of any possible inconsistency overruled, 56 I.D. 73 (1937).

White, Anderson (Probate 13570-35); overruled, 58 I.D. 149, 157 (1942).

White, Sarah V. (40 L.D. 630); overruled in part, 46 L.D. 55, 56 (1917).

Whitten *v.* Read (49 L.D. 253, 260; 50 L.D. 10); vacated, 53 I.D. 447 (1928).

Wickstrom *v.* Calkins (20 L.D. 459); modified, 21 L.D. 553; overruled, 22 L.D. 392 (1896).

Widow of Emanuel Prue (6 L.D. 436); vacated, 33 L.D. 409 (1905).

Wiley, George P. (36 L.D. 305); modified so far as in conflict, 36 L.D. 417 (1908).

Wilkerson, Jasper N. (41 L.D. 138); overruled, 50 L.D. 614 (1924) (See 42 L.D. 313).

Wilkens, Benjamin C. (2 L.D. 129); modified, 6 L.D. 797.

Williamette Valley and Cascade Mountain Wagon Road Co. *v.* Bruner (22 L.D. 654); vacated, 26 L.D. 357 (1898).

Williams, John B., Richard & Gertrude Lamb (61 I.D. 31); overruled so far as in conflict, 61 I.D. 185 (1953).

Willingbeck, Christian P. (3 L.D. 383); modified, 5 L.D. 409.

Willis, Cornelius (47 L.D. 135); overruled, 49 L.D. 461 (1923).

Willis, Eliza (22 L.D. 426); overruled, 26 L.D. 436 (1898).

Wilson *v.* Heirs of Smith (37 L.D. 519); overruled so far as in conflict, 41 L.D. 119 (1912) (See 43 L.D. 196).

Winchester Land & Cattle Co., 65 I.D. 148 (1958), no longer followed in part, 80 I.D. 698 (1973).

Witbeck *v.* Hardeman (50 L.D. 413); overruled so far as in conflict, 51 L.D. 36 (1925).

Wolf Joint Ventures, 75 I.D. 137 (1968); distinguished, U.S. *v.* Union Carbide Corp., 31 IBLA 72, 84 I.D. 309 (1977).

Wright *v.* Smith (44 L.D. 226); overruled, 49 L.D. 374 (1922).

Zeigler Coal Co., 4 IBMA 139, 82 I.D. 221, 1974–1975 OSHD par. 19,638 (1975); overruled in part, Alabama By-Products Corp. (on Reconsideration), 7 IBMA 85, 83 I.D. 574 (1976).

Zimmerman *v.* Brunson (39 L.D. 310); overruled, 52 L.D. 714 (1929).

NOTE.—The abbreviations used in this title refer to the following publications: "B.L.P." to Brainard's Legal Precedents in Land and Mining Cases, vols. 1 and 2. "C.L.L." to Copp's Public Land Laws edition of 1875, 1 volume; edition of 1882, 2 volumes; edition of 1890, 2 volumes. "C.L.O." to Copp's Land Owner, vols. 1-18. "L. and R." to records of the former Division of Lands and Railroads; "L.D." to the Land Decisions of the Department of the Interior, vols. 1-52. "I.D." to Decisions of the Department of the Interior, beginning with vol. 53.—EDITOR.

blank page

TABLE OF STATUTES CITED

(A) ACTS OF CONGRESS

Page

1850:
  Sept. 9 (9 Stat. 452) 636
1872:
  May 10 (17 Stat. 91) 252, 637
1874:
  Apr. 15 (18 Stat. 28) 105
1887:
  Feb. 8 (24 Stat. 388) 99, 512
1889:
  Mar. 2 (25 Stat. 888) 107
1896:
  May 21 (29 Stat. 127) 295
1897:
  Feb. 11 (29 Stat. 526) 479
  June 4 (30 Stat. 35) 2
1898:
  July 1 (30 Stat. 544) 502
1899:
  Feb. 28 (30 Stat. 908) 55
1906:
  June 8 (34 Stat. 225) 55
1910:
  June 25 (36 Stat. 847) 41, 129
  June 25 (36 Stat. 855) 68
  June 25 (36 Stat. 856) 105
1911:
  Mar. 4 (36 Stat. 1253), *as amended*, May 27, 1952 (66 Stat. 95) 55
  Mar. 4 (36 Stat. 1345) 509
1914:
  Sept. 5 (38 Stat. 712) 144
1915:
  Mar. 4 (38 Stat. 1101), *as amended*, July 28, 1956 (70 Stat. 708) 55
1920:
  Feb. 25 (41 Stat. 437) 19, 69, 205, 248, 291, 479
  June 10 (41 Stat. 1063) 144
1925:
  Feb. 27 (43 Stat. 1013) 353

Page

1926:
  Apr. 17 (44 Stat. 301) 71
1927:
  Feb. 7 (44 Stat. 1057) 71
1928:
  Dec. 22 (45 Stat. 1069) 82
1931:
  Mar. 3 (46 Stat. 1494) 316
1933:
  Feb. 9 (47 Stat. 798) 72
1934:
  June 18 (48 Stat. 984) 105, 316, 508
1935:
  Aug. 21 (49 Stat. 674) 72, 297
1940:
  July 8 (54 Stat. 746) 313
1942:
  July 3 (56 Stat. 647) 279
  Nov. 24 (56 Stat. 1021) 106, 601
1946:
  May 16 (60 Stat. 1097) 19
  Aug. 8 (60 Stat. 951) 71, 622
1947:
  July 31 (61 Stat. 681) 129
1948:
  Mar. 30 (62 Stat. 100) 55
  June 3 (62 Stat. 291) 73
1949:
  June 21 (63 Stat. 214) 397
1950:
  Apr. 24 (64 Stat. 84) 55
1951:
  Sept. 28 (65 Stat. 336) 126
1952:
  May 27 (66 Stat. 95), *amending*, Act of Mar. 4, 1911 (36 Stat. 1253) 55
1953:
  May 22 (67 Stat. 29) 518
  Aug. 7 (67 Stat. 462, 464) 550
  Aug. 12 (67 Stat. 557) 297
1954:
  July 29 (68 Stat. 585) 620

Page
1955:
July 23 (69 Stat. 367) 386
Aug. 9 (69 Stat. 539) 192
1956:
Mar. 29 (70 Stat. 62) 505
July 28 (70 Stat. 708), *amending*, Act of Mar. 4, 1915, (38 Stat. 1101) 55
1958:
July 7 (72 Stat. 339) 282, 290, 371, 376
Aug. 23 (72 Stat. 829) 252
1965:
Nov. 8 (79 Stat. 1295) 630
1966:
Oct. 15 (80 Stat. 915) 27
1968:
Apr. 11 (82 Stat. 77) 504
Sept. 26 (82 Stat. 870) 350
1970:
Jan. 1 (83 Stat. 852) 27
1971:
Dec. 18 (85 Stat. 688) 2, 81, 123, 163, 165, 220, 280, 286, 342, 367, 374, 482, 604
1972:
Aug. 22 (86 Stat. 612) 399
Oct. 18 (86 Stat. 816) 420
1973:
Nov. 16 (87 Stat. 576) 2
1976:
Jan. 2 (89 Stat. 1145) 2
Aug. 4 (90 Stat. 1083)
Aug. 4 (90 Stat. 1091)
Oct. 4 (90 Stat. 1934) 2
Oct. 21 (90 Stat. 2743) 129, 400, 4
1977:
May 4 (91 Stat. 61) 4
July 26 (91 Stat. 285) 4
Aug. 3 (91 Stat. 445) 11, 59, 61, 196, 207, 246, 305, 3
325, 328, 332, 334, 348, 378, 3
384, 415, 417, 431, 435, 438, 4
495, 522, 555, 557, 571, 580, 5
589, 644, 646, 670
Dec. 27 (91 Stat. 1566) 4
1978:
Sept. 18 (92 Stat. 636) 6
Oct. 30 (92 Stat. 2073)
Nov. 1 (92 Stat. 2383) 94, 180, 4
Nov. 6 (92 Stat. 2549) 5
1980:
Apr. 2 (94 Stat. 229) 66
Sept. 26 (94 Stat. 1207) 5

ACTS CITED BY POPULAR NAME

Page

Acquired Lands Mineral Leasing Act 300
Administrative Procedure Act 110, 263, 426, 638
Alaska Native Claims Settlement Act 1, 81, 123, 163, 164, 219, 278, 286, 341, 366, 372, 422, 480, 560, 603
Alaska Statehood Act 279, 286, 366, 373
Antiquities Act 600
Bald & Golden Eagle Protection Act 534
Bankruptcy Act 502
Clean Water Act of 1977 420
Coastal Zone Management Act of 1972 551
Color of Title Act 82
Contract Disputes Act of 1978 94, 180, 450
Crude Oil Windfall Profit Tax Act 661
Department of the Interior & Related Agencies Appropriations Act 477
Endangered Species Act of 1973 525
Energy Supply Act of 1974 566
Federal Coal Leasing Amendments Act of 1975 15, 69
Federal Coal Leasing Amendments Act of 1976 19
Federal Land Policy & Management Act of 1976 23, 143, 265, 291, 350, 400, 428, 462, 473, 479
Federal Property & Administrative Services Act 124
Federal Water Pollution Control Act Amendments of 1972 420
Federal Water Power Act 144
General Allotment Act 99, 512
General Withdrawal Act (the Pickett Act) 169

Page

Highway Beautification Act 505
Historic Sites Act of 1935 595
Homestead Act 144
Independent Offices Appropriations Act of 1952 475
Indian Child Welfare Act of 1978 316
Indian Civil Rights Act of 1968 501
Indian Reorganization Act of 1934 105, 316, 508
Migratory Bird Treaty Act 534
Mineral Lands Leasing Act of 1920 19, 69, 205, 248, 291, 479, 537, 620, 661
Mineral Leasing Act of 1954 620
Mining & Mineral Policy Act of 1970 551
Mining Law of 1872 252, 537
National Environmental Policy Act of 1969 19, 21, 27, 551, 593
National Historic Preservation Act 27, 593
Oil Placer Act 479
Outer Continental Shelf Lands Act 478, 517, 544, 563, 593, 616, 648
Pickett Act 41, 129
Public Sales Act 356
Reorganization Plan No. 3 of 1946 19
Sioux Allotment Act 107
Small Business Act 116
Submerged Lands Act 518, 622
Surface Mining Control & Reclamation Act of 1977 9, 11, 59, 61, 114, 119, 139, 168, 172, 177, 187, 196, 207, 245, 304, 309, 319, 324, 327, 331, 334, 347, 362, 378, 380, 383, 414, 416, 430, 434, 437, 439, 447, 494, 521, 554, 557, 570, 580, 584, 589, 643, 645, 669
Surface Resources Act 386
Unintentional Trespass Act 350

(B) REVISED STATUTES

	Page
§ 2319	637
§ 2320	637
§ 2324	63

(C) UNITED STATES CODE

Title 5:	
§ 552(a)(2)	113
§ 553	426
§ 556	263
§ 556(d)	445
§ 557(c)	638
§ 3105	637
Title 11:	
§§ 1—1103	502
§ 24	503
§ 35	502
§ 35(c)(3)	505
§ 93(g)	506
§ 93(h)	506
§ 101	506
Title 15:	
§ 637(a)	116
Title 16:	
§ 431	55
§§ 431-33	600
§ 432	55
§ 460q-5	630
§ 460aa-9	399
§ 461	595
§ 470 *et seq.*	595
§ 470a(a)	596
§ 470f	28, 596
§ 470s	28
§ 495	55
§ 497	55
§ 523	55
§ 551	2
§ 580d	55
§ 668 *et seq*	534
§ 703 *et seq*	534
§ 1533(d)	526
§ 1539(e)	527
Title 23:	
§ 18	54
§ 317	54
Title 25:	
§ 145	19
§§ 323-324	19
§§ 331-358	9
§ 348	10
§ 349	10
§ 354	10
§§ 372-373	103, 31
§ 372a	31
§ 372a(1)(a)	31
§ 373	6
§ 373a	10
§ 373b	106, 60
§ 393	20
§ 397	20
§ 403	20
§ 410	10
§ 415	19
§ 461	51
§§ 461-479	31
§§ 461-486	50
§ 462	10
§ 464	51
§ 465	50
§ 466	20
§ 478	50
§ 479	50
§ 483	51
§ 483a	102, 505
§§ 1301-1341	504
§ 1302	501
§§ 1901-1963	316
Title 30:	
§ 22	252, 389, 637
§ 23	633
§ 26	257
§ 28	249, 537, 637
§ 28b	398
§ 28c	399
§ 29	264
§§ 35-36	479
§ 181 *et seq.*	252, 293, 537, 620, 661

Title 30—Continued
Page
§§ 181–287 19
§ 185 291
§ 185(a) 302
§ 185(d) 298
§ 185(r)(4) 297
§ 186 291
§ 187 293
§ 189 293
§ 191 661
§ 193 .... 249, 537
§ 201(a) 18
§ 201(b) 15, 80
§ 207 .... 79, 205
§ 207(a) 70
§ 209 70
§ 212 70
§ 211(b) 80
§ 226 .... 72, 292
§ 226(b) 71
§ 226(c) 71
§ 226(d) 70
§ 226(j) 202, 621
§ 241 79
§ 262 71
§ 272 71
§ 282 71
§ 283 71
§§ 601–604 129
§ 611 386
§ 1201 140
§§ 1201–1328 .... 12, 114, 119, 173, 177, 187, 208, 246, 325, 328, 332, 334, 348, 378, 381, 384, 415, 417, 431, 435, 438, 447, 522, 555, 557, 580, 585, 646
§ 1201(c) 583
§ 1201(e) 583
§ 1201(f) 584
§ 1201(j) 583
§ 1202 140
§ 1202(a) 583
§ 1202(m) 583
§ 1217(a)(5) 121
§ 1221(c) 174
§ 1251 174
§ 1252 349
§ 1252(a) 119, 170, 496, 582
§ 1252(b) 173, 442, 575
§ 1252(c) 139, 173, 442, 495
§ 1252(e) 173
§ 1255 210
§ 1255(b) 336, 571

Title 30—Continued
Page
§ 1265(b)(3) 571
§ 1265(e) 574
§ 1265(e)(1) 574
§ 1267(b)(3) 432
§ 1268 .... 322, 670
§ 1268(c) 321
§ 1268(h) 523
§ 1271 644
§ 1271(a) 174, 586
§ 1271(a)(1) 248, 325, 432
§ 1271(a)(2) 169
§ 1271(a)(3) 12, 62, 139, 171, 196, 247, 326, 416, 418, 495, 585, 591, 670
§ 1271(a)(5) 305, 584
§ 1272(e)(4) 435, 496
§ 1272(e)(5) 589
§ 1275 670
§ 1275(a)(1) 320
§ 1275(b) 577
§ 1275(c) 178
§ 1278(2) 248, 583
§ 1291(2) 576
§ 1291(28) 442
§ 1291(28)(B) 444
§ 1294 174
Title 31:
§ 483a 474
Title 33:
§ 1311 420
Title 41:
§§ 601–613 .... 185, 458
Title 42:
§§ 4321–35 .... 19, 23
§ 4321 *et seq* 596
§ 4331(b) 596
§ 4332 28
§ 4332(2)(C)(i) 32
Title 43:
§ 141 .... 41, 129
§ 697 153
§ 1068 86
§§ 1068–1068b 82
§ 1171 (1970) 356
§ 1301 *et seq.* 622
§ 1331 *et seq* 544, 594, 617
§§ 1331–1356 478
§ 1332(a) 479
§ 1332(b) 546
§ 1332(3) 626
§ 1332(4) 546
§ 1334 .... 546, 651

Title 43—Continued Page
§ 1334(a) 546, 565, 625
§ 1334(a)(1) 547, 621
§ 1334(a)(4) 547, 620
§ 1334(a)(7) 546, 620
§ 1334(a)(8) 545
§ 1334(b) 627
§ 1334(c) 627
§ 1334(d) 627
§ 1334(g) 546
§ 1337 649
§ 1337(a)(2) 623
§ 1337(b)(2) 618
§ 1337(b)(2)(A) 618
§ 1337(b)(2)(B) 618
§ 1337(b)(4) 546
§ 1337(b)(5) 547
§ 1337(d) 627
§ 1340 521, 627
§ 1340(a)(1) 517
§ 1340(c)(1) 627
§ 1344(g) 565
§ 1345 545
§ 1347(b) 546
§ 1351 544, 627
§ 1351(a)(1) 544
§ 1351(b) 544
§ 1351(c) 544
§ 1351(e)(1) 549
§ 1351(g) 545
§ 1351(j) 627
§ 1352(a)(1) 564
§ 1352(a)(1)(C) 569
§ 1371 475
§ 1374 475
§§ 1431–1435 350
§§ 1451–1457 636
§ 1601 482, 604

Title 43—Continued
§§ 1601–1628 2,
125, 163, 165, 220, 280, 286,
367, 374, 604
§ 1602(e)
§ 1611(a)
§ 1611(c)
§ 1624
§ 1701
§§ 1701–1781
§§ 1701–1782
§ 1702(e)
§ 1714
§ 1714(a)
§ 1714(b)
§ 1714(b)(1)
§ 1714(i)
§ 1722
§ 1734
§ 1734(c)
§ 1735
§ 1744 265, 400,
§ 1745
§ 1746
§§ 1761–1771 292,
§ 1761(a)
§ 1764
§ 1801(6)
§ 1802
§ 1802(1)
§ 1802(2)
§ 1802(3)
§ 1802(5)
§ 1802(6)
§ 1863
§ 1866(a)
§ 2334(a)(4)
§ 2334(a)(7)
Title 48:
§ 341

EXECUTIVE ORDERS

Page
1873, Nov. 4: Executive Order 512
1939, Apr. 29: Executive Order No. 8102 23
1940, Feb. 10: Executive Order No. 8343 23
1941, May 16: Executive Order No. 8755 23
1941, Aug. 8: Executive Order No. 8847 23
1945, Feb. 28: Executive Order No. 9526 amended Executive Order No. 8102
1952, May 26: Executive Order No. 10355 17 FR 4831 (1952) 23
41,
1971, May 13: Executive Order No. 11593

PRESIDENTIAL PROCLAMATIONS

	Page
1941, May 27: Presidential Proclamation No. 2487 (55 Stat. 1647)	23

AGREEMENTS AND TREATIES

	Page
1848, Feb. 2: Treaty of Guadalupe Hidalgo (9 Stat. 922)	636
1953, June 30: United States & Canada Agreement (4 U.S.T. 2223) (T.I.A.S. No. 2875)	483
1855, July 1: Treaty (12 Stat. 971)	512
1856, Jan. 25: Treaty (12 Stat. 971)	512

blank page

DEPARTMENTAL ORDERS AND REGULATIONS CITED

Code of Federal Regulations:	Page
Title 25:	
§ 2.2	206
§ 2.3	501
§ 2.18	195
§ 2.19	195, 504
§ 2.19(b)	202, 502
§ 11.29C	316
§ 104.9	503
§ 109.4	501
§§ 121.17—121.23	101
§ 121.34	107, 505
§ 131.5	192
§ 131.12	192
§ 131.14	190
§ 151.2	203
§ 151.3	203
§ 151.4	203
§ 151.13	203
§ 151.13(b)	203
§ 255	530
§ 256	530
§ 258	530
Title 26:	
§ 1.611-1(b)(1)	663
Title 30:	
§ 250.2(iii)	618
§ 250.12(d)	569
§ 250.33(a)	627
§ 250.33(b)	627
§ 250.34-1(a)(1)	627
§ 250.34-1(a)(2)(ii)	547
§ 250.34-1(j)	627
§ 250.34-1(k)	569
§ 250.34-2	546
§ 250.34-2(a)(1)	627
§ 250.34-2(a)(2)	548
§ 250.34-2(a)(3)(i)	547
§ 250.34-2(*l*)	627
§ 250.34-2(n)	569
§ 250.34-3(a)(1)(iii)	548
§ 250.34-3(b)(1)(iv)	548
§ 250.39	569
§ 250.40	569
§ 250.50	651
Title 30—Continued	
§ 250.50(b)	619
§ 250.50(g)(1)	620
§ 250.50(g)(2)	620
§ 250.50(i)	620
§ 250.50(j)	621
§ 250.51-52	617
§ 250.95	569
§ 251.11	570
§ 251.12	570
§ 251.13	564
§ 700.5	170, 196, 329, 335, 347, 382, 440, 555, 669
§ 700.11	442, 583
§ 700.11(b)	580
§ 701.5	170
§ 710.4	436
§ 710.5	14, 307, 332, 384, 419, 571
§ 710.11	14
§ 710.11(a)(1)	582
§ 710.11(a)(2)	119, 178
§ 710.11(a)(2)(i)	170
§ 710.11(a)(3)(ii)	495
§ 710.12	139, 571
§ 710.12(b)(2)	139
§ 710.12(d)	141
§ 710.12(e)	140
§ 710.12(g)(1)	140
§ 715.11(a)	582
§ 715.11(b)	378
§ 715.12	348
§ 715.12(a)	433
§ 715.12(b)	114, 430, 558
§ 715.12(c)	670
§ 715.12(e)	430
§ 715.12(f)	496
§ 715.14	61, 139, 246, 521, 573, 645
§ 715.14(b)	496, 522
§ 715.14(b)(2)	524
§ 715.14(b)(2)(iii)	523
§ 715.14(j)	496
§ 715.15(b)(4)	558
§ 715.15(b)(8)	558
§ 715.15(b)(9)	558

Title 30—Continued Page
§ 715.16 246, 446
§ 715.16(a) 119
§ 715.16(a)(4) 449
§ 715.16(a)(4)(i) 448
§ 715.16(a)(4)(ii) 448
§ 715.17 197, 306, 325, 348, 420
§ 715.17(a) 119, 207, 306, 320, 325, 380, 417, 431, 437, 439, 496, 555, 557, 580, 670
§ 715.17(a)(1) 557
§ 715.17(d) 383
§ 715.17(d)(1) 383
§ 715.17(d)(3) 334, 496
§ 715.17(f) 120
§ 715.17(*l*) 309
§ 715.17(*l*)(1) 574
§ 715.17(*l*)(2) 496
§ 715.17(*l*)(2)(iv) 643
§ 715.17(*l*)(3) 579
§ 715.19(e)(1)(vii)(A) 362
§ 715.20(a)(1) 585
§ 715.20(a)(2) 558
§ 715.20(c) 585
§ 715.20(d) 585
§ 715.200(c) 449
§ 716.2 187, 305, 574
§ 716.2(a) 246, 304, 331, 580
§ 716.2(b) 574
§ 716.3 306
§ 716.3(b)(5) 305
§ 717.14 13
§ 717.14(e) 10
§ 717.17 10, 325
§ 717.17(a) 320, 325, 328, 380
§ 717.17(j) 209
§ 717.17(j)(3)(i) 11
§ 721.11 417
§ 721.11(a) 11
§ 721.12(a) 59, 432
§ 721.13 11
§ 722 174
§ 722.11 175
§ 722.11(a) 170
§ 722.11(b) 170
§ 722.12 175, 434
§ 722.12(a) 11, 175, 326
§ 722.13 170, 416, 587
§ 722.16 366
§ 723.12 364
§ 723.14 178, 421

Title 30—Continued Page
§ 723.14(a) 417
§ 723.15(b)(2) 422
§ 723.16 365
§§ 723.16–.18 323
§ 723.16(a) 363
§ 723.17 197, 320
§ 723.18(a) 322
§ 761.5 591
§ 843.12(b) 308
Title 36:
§ 61.2 600
§ 251.1 55
§ 292.18(c) 398
§ 800.2(c) 29, 596
§ 800.2(o) 29, 597
§ 800.3 32
§ 800.3(a) 30
§ 800.3(m) 600
§ 800.4(a) 27, 596
§ 800.4(a)(1) 34, 601
§ 800.4(b) 29
§ 800.5(a) 600
§ 800.9 32
§ 800.11 33, 596
Title 39:
§ 111.1 615
Title 40:
§ 1501.7(a)(6) 596
§ 1502.16(g) 596
§ 1502.25 596
§ 1508.8 32
§ 1508.25(a) 33
Title 41:
§§ 1–3.409(b) 453
§§ 1–3.409(c) 453
Title 43:
§ 2.2 113
§ 3.1 55
§ 4.1(b)(4) 322
§ 4.1(b)(5) 220, 341
§ 4.21(b) 397
§ 4.22(f) 365
§ 4.24(b) 143
§ 4.205(b) 603
§ 4.211(c) 99
§ 4.233 68
§ 4.240(a)(3) 102
§ 4.250 99
§§ 4.250–4.251 102
§§ 4.250–4.252 102
§ 4.250(a) 103

Title 43—Continued Page
§ 4.250(b) 103
§ 4.250(g) 103
§ 4.251 110
§ 4.252 105
§ 4.271 102
§ 4.290 100
§§ 4.350–4.369 202
§ 4.351 206
§§ 4.361–4.367 202
§ 4.361(a) 207
§ 4.368 202
§ 4.401(c)(3) 612
§ 4.415 112
§§ 4.900–4.913 125
§ 4.902 .... 1, 219, 224, 560, 606
§ 4.903 604
§ 4.903(b) 282
§ 4.909(b) 164, 603
§ 4.909(d) 167, 609
§ 4.913 604
§ 4.913(b) 484, 608
§ 4.1101(b) 578
§ 4.1113 310
§ 4.1123 310
§ 4.1123(b) 309
§ 4.1124 364
§ 4.1125 138
§ 4.1150 197
§ 4.1152(b) 322, 417
§ 4.1152(b)(1) 10, 321, 418
§ 4.1152(c) 322
§ 4.1153 187
§ 4.1155 644
§§ 4.1160–.1171 365
§ 4.1161 364
§§ 4.1161–.1162 362
§ 4.1162 .... 197, 346
§ 4.1167 309
§ 4.1171 .... 208, 591, 644
§ 4.1171(a) 170
§ 4.1171(b) 644
§ 4.1181 12
§ 4.1260 417
§ 4.1262 178
§ 4.1263 177
§ 4.1270 .... 197, 418
§ 4.1271 197
§ 4.1271(b) 430
§ 4.1273(c) 327
§ 4.1275 578

Title 43—Continued Page
§ 1810.2 613
§ 1810.2(b) 611, 614
§ 1862.4 637
§ 2091.1 124
§ 2351.2(a) 607
§ 2372.1 134
§ 2372.2 134
§ 2372.3 135
§ 2374.1 135
§ 2374.1(c) 136
§ 2374.2 134
§ 2650.3–1(a) 163, 282
§ 2650.7 .... 165, 341
§ 2650.7(d) 341
§ 2651.2(a)(6) 284
§ 2651.2(a)(7) 284
§ 2711.4(b) 352
§ 2711.4(b)(2) 351
§ 2785 (1971) 356
§ 2802.1–2 473
§ 2802.1–2(a)(3) 473
§ 2802.1–2(a)(4) 474
§ 3100.0–5(b) 467
§ 3102.2–2 498
§ 3102.2–7 498
§ 3102.2–7(b) 498
§ 3102.4–1 110
§ 3102.6–1(a)(1) 471
§ 3102.6–1(a)(2) 471
§ 3102.7 .... 465, 497
§ 3103.3–7 77
§ 3105.2 291
§ 3112.2–1(a) 465
§ 3112.4–1 111
§ 3112.5 111
§ 3112.5–1 111
§ 3112.5–2 465
§ 3120.1–4 498
§ 3451.1(a)(2) 80
§ 3473.3–2(d)(1) 76
§ 3503.3–2(a)(1)(i) 71
§ 3503.3–2(d) 76
§ 3503.3–2(d)(1) 77
§ 3521.1–1 19
§ 3521.1–1(b) 15
§ 3522.1–1 79
§ 3562.3–6(a) 71
§ 3852.2(c) 395
Title 50:
§ 17.31 526

best copy available

MISCELLANEOUS REGULATIONS

Page
1942, Oct. 12: Public Land Order No. 47—Alaska, withdrawing public lands for military purposes 23
1943, Mar. 12: Public Land Order No. 95—Alaska, withdrawal for military purposes 23
1945, June 12: Public Land Order No. 284—Alaska, amending Executive Order & Public Land Order withdrawing lands for military purposes 23
1959, June 26: Public Land Order No. 1887—Alaska, withdrawing lands for use of Dept. of Army in connection with Haines-Fairbanks Project Pipeline System; revoking PLO No. 1045, Dec. 28, 1954, as amended 125
1962, May 4: Public Land Order No. 2676—Alaska, amending certain orders which withdrew lands for use of War Dept. for military purposes (27 FR 4516) 21
1972, Mar. 4: Public Land Order No. 5164—Alaska, withdrawal for the Department of the Air Force (36 FR 4713) 604
1973, July 17: Public Land Order No. 5353—Alaska, withdrawal of lands pending determination of eligibility of native communities and for classification of lands in withdrawal (38 FR 19825) 280
1972, Oct. 6: Secretarial Order No. 2948—BLM & USGS Responsibilities—Administration of the Mineral Leasing Laws—Onshore 291
1977, Oct 14: Secretarial Order No. 3011—(43 FR 55280) 476
1977, Dec. 14: Secretarial Order No. 3016—Valid Existing Rights Under the Alaska Native Claims Settlement Act (85 I.D. 1 (1978)) . 280, 288, 368, 375
1978, Nov. 20: Secretarial Order No. 3029—Valid Existing Rights Under the Alaska Native Claims Settlement Act (43 FR 55287, Nov. 27, 1978) .. 279, 286, 366, 373

U. S. GOVERNMENT PRINTING OFFICE : 1981 O - 347-963

best copy available

DECISIONS OF THE DEPARTMENT OF THE INTERIOR

APPEALS OF JOHN F. THEIN, KENNETH E. SCHOONOVER, WENDELL SKAFLESTAD AND KOLBJORN SKAFLESTAD

4 ANCAB 116

Decided *January 11, 1980*

Decision of the Bureau of Land Management AA-6980-A.

Affirmed.

1. Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Third-Party Interests

Where Forest Service permits were terminated for apparent cause (failure to comply with permit conditions), the original holders of the permits no longer have property interests which constitute valid existing rights protected by § 14(g) of ANCSA.

2. Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Third-Party Interests

Where the holder of a Forest Service permit requested that his special use permit be canceled and the Forest Service did so and, subsequently, issued a special use permit for the same lot to another person, the original holder of the permit no longer has a property interest or a valid existing right derived from the permit which is protected under § 14(g) of ANCSA.

3. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Standing

If the only interest in land claimed by appellants affected by the decision appealed was a terminated or relinquished special use permit, the appellants will be found to lack a property interest in land sufficient to confer standing under regulations in 43 CFR 4.902.

4. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Jurisdiction

There is no administrative appeal process available to claimants under § 14(c) of ANCSA, and such claims must be brought in a judicial forum.

APPEARANCES: James A. Calvin, for Forest Service, U.S. Department of Agriculture; Fred J. Baxter, Esq., for Huna Totem Corp.; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, for the Bureau of Land Management. The following parties appeared pro se: John F. Thein; Kenneth E. Schoonover, Wendell Skaflestad, Kolbjorn Skaflestad.

OPINION BY ALASKA NATIVE CLAIMS APPEAL BOARD

SUMMARY OF APPEAL

Appellants claim property interests through terminated or relinquished U.S.D.I. Forest Service special use permits in land approved for conveyance to Huna Totem Corp. pursuant to § 14(b) of ANCSA. The Board rejects the appellants' claims and affirms the Bureau of Land Management's decision to issue conveyance since terminated or relinquished special use permits do not constitute valid existing rights and do not receive protection under § 14(g) of ANCSA.

JURISDICTION

The Alaska Native Claims Appeal Board, pursuant to delegation of authority to administer the Alaska Native Claims Settlement Act, 85 Stat. 688, *as amended*, 43 U.S.C. §§ 1601–1628 (1976 and Supp. I 1977), and the implementing regulations in 43 CFR Part 2650 and 43 CFR Part 4, Subpart J, hereby makes the following findings, conclusions and decision.

PROCEDURAL BACKGROUND

On June 27, 1979, the Bureau of Land Management (BLM) issued a decision to issue conveyance AA-6980-A which approved for conveyance to Huna Totem Corp., suant to § 14(b) of ANCSA, tain lands applied for on Dec 1974.

On July 18, 1979, John F. T filed a Notice of Appeal from above-mentioned BLM decision subsequently three similar No of Appeal were filed on July 1979, by Kenneth Schoon Wendell Skaflestad, and Kolb Skaflestad. These four appell claim a property interest in l affected by the BLM dec through special use permits is by the Forest Service, Ur States Department of Agricul (hereafter Forest Service). resident lots are located in an designated the Gartina-G Creek Residence Group, Hoo Alaska, and one lot located in Neck Point Residence Gr Spasski Bay.

Since all appellants claim t property interests by virtue of cial use permits issued by the Fo Service under authority of the of June 4, 1897 (30 Stat. 35 U.S.C. § 551 (1967)), the Boar sued an order on July 27, 1979, ing the Forest Service a neces party to this appeal. The Fo Service responded to this orde Aug. 9, 1979.

BLM, on Aug. 1, 1979, fil motion to consolidate the four peals since letters filed by the pellants relate to the same area all appeals concern possible ri gained from Forest Service sp use permits. On Aug. 10, 1 ANCAB consolidated the sepa appeals (Thein, ANCAB VLS 79-29; Schoonover, ANCAB VLS 79-30; W. Skaflestad, ANCAB VLS 79-31; K. Skaflestad, ANCAB VLS 79-32) and assigned the consolidated appeal number ANCAB VLS 79-32 (Consolidated).

On Oct. 11, 1979, the BLM filed its Answer in response to appellants' notices of appeal.

FACTUAL BACKGROUND

NECK POINT RESIDENCE GROUP—SPASSKI BAY

The Forest Service issued a special use permit to Mr. Kenneth E. Schoonover which appears to have been in effect on 9/1/60, for Lot 2, Neck Point group of residences, Spasski Bay. On Mar. 30, 1970, Mr. Schoonover filed with the Forest Service a relinquishment thereby giving up all rights, title and interests to his improvements covered by a special use permit and concurrently requested cancellation of the permit. The Forest Service issued a special use permit to Charles Johnson on Sept. 3, 1971, for "Lot 2, Neck Point group of residence, Spasski Bay (formerly under permit to Kenneth E. Schoonover, 9/1/60)." Mr. Johnson's permit was terminated for nonpayment of fees (letter from Clyde A. B. Ferguson, Acting Program Manager Recreation Lands, to Jim Calvin, Regional Office, Lands, U.S. Forest Service, Subject: Lot 2 Spasski (Neck Point)—Kenneth Schoonover, Nov. 27, 1979.)

GARTINA-GAME CREEK RESIDENT GROUP, HOONAH, ALASKA

The Forest Service issued special use permits to the following individuals for residential lots at Gartina-Game Creek Residence Group, Hoonah, Alaska:

Name	Lot No.	Date of Issue
John F. Thein	20	10/15/70
Kenneth Schoonover	13	9/14/70
Wendell Skaflestad	22	6/16/71
Kolbjorn A. Skaflestad	21	11/9/70

On Sept. 11, 1973, the Forest Service examined the lots and reported that none of the four permit holders had met the construction time schedule which was a condition of the permits. The examiner recommended termination of permit if acceptable justification was not received. By certified letter dated Sept. 13, 1973, the Forest Service notified each permit holder of the site visit and cited provisions in the permit for construction. The permit holders were given until Oct. 15, 1973, to "show just cause why construction has not been accomplished as agreed upon in your permit." Each permit holder responded indicating some land clearing but no construction. In July 1974, the Regional Forester sent identical letters to the four permit holders explaining that Gartina-Game Creek residence tract lies entirely within the Huna Totem Village Corp. selection area under ANCSA. The permit holders were further informed that "[t]he Settlement Act provides that selected lands are subject to valid existing rights." In closing, the Regional Forester states: "Because you have not completed construction, and in light of the situation as we have described it, we now believe that your permit should be closed. We will delay our final decision on this until September 1, 1974 to provide opportunity for you to express your thoughts."

The Regional Forester, by certified letter to each permit holder, terminated the permits for all four appellants on the dates shown:

John Thein	October 25, 1974.
Kenneth Schoonover	November 8, 1974.
Wendell Skaflestad	December 20, 1974.
Kolbjorn Skaflestad	November 11, 1974.

CONTENTIONS OF PARTIES

Appellant, Mr. John F. Thein, by letter to ANCAB on July 16, 1979, asserts a vested interest in Lot 2 of the Gartina-Game Creek Residence Group, Hoonah, Alaska, through a terminated special use permit from the Forest Service, commencing Sept. 1, 1970. Mr. Thein states he "made some improvements to the lot with the intention of building a residence on the lot as was the purpose of the permit. Due to the inaccessibility of the lot, it wasn't feasible to build a permanent family residence at that time." According to Mr. Thein's letter, lot holders were told by a representative of the Forest Service that "the lots were eventually to be transferred
to the State of Alaska" and th
when the transfer took place, t
lot holders would "have the o
tion of purchasing the lots at r
land value." Mr. Thein furth
states that "[f]or the above r
sons, I believe I should be entit
to the option of purchasing
lot I held."

Appellant, Mr. Kenneth
Schoonover, by letter to BLM
July 6, 1979, asserts a third-pa
interest under ANCSA in t
different lots within the Hu
Totem Corporation selection a
In 1970, Mr. Schoonover acqu
use of Lot 13, Gartina-Ga
Creek Residence Group land.
Schoonover also had acquired
of Lot 2, Neck Point Reside
Group at Spasski Bay. Since
could not occupy two reside
group lots at the same time,
turned over his hunting cabin
Spasski Bay to Charles John
and requested cancellation of
special use permit for Lot 2. In
July 6 letter Mr. Schoonover sta

> We would be satisfied with jus
> first-preference rights status if
> land should become available for
> if it is impossible for us to acq
> the lots outright through your offic
> accordance to the steps set fort
> the Alaska Native Claims Settle
> Act.
>
> The foregoing being my claim o
> lot in the Neck Point Residence G
> and the Gartina-Game Creek Resid
> Group I hereby file my appeal
> ask to be conveyed the two lot
> this be impossible, I agree to be
> veyed the lot in Spasski Bay a
> agree also to be placed on a
> preference status to acquire

Gartina-Game Creek lot from the Se-Alaska or Huna Totem corporations at a later date should they acquire it and agree to sell it.

Appellant, Kolbjorn Skaflestad, in a letter to ANCAB on July 17, 1979, feels that he should have "first priority to purchasing" Lot 21, U.S. Survey 2414 (Gartina-Game Creek Residence Group land).

Appellant, Wendell Skaflestad, in a letter to BLM on July 9, 1979, states that on June 12, 1971, he "signed a contract with the U.S. Forest Service for Lot 22, Gartina-Game Creek Residence Group, Hoonah, Alaska." Mr. W. Skaflestad alludes to having valid existing rights to acquiring land in the Residence Group. In a letter to ANCAB on July 25, 1979, Mr. W. Skaflestad closes with the following: "I appeal the decision and would like a commitment from you that I will have the opportunity to purchase and hold title to my lot."

The Regional Forester, Forest Service, in response to ANCAB order joining the Forest Service as a party to the appellants' appeals states:

> The permits once held by the appellants were cancelled for non-compliance with the terms of the permits, and they no longer have any valid interests in the area. That being the case, we would not agree that the appellants have any rights pursuant to Sec. 14(g) of ANCSA.

Letter, USDA Forest Service to Honorable Judith M. Brady, ANCAB, Aug. 9, 1979.

DECISION

All appellants claim property interests in Gartina-Game Creek Residence Group tract through Forest Service special use permits terminated for failure to construct within the time limits set in the conditions of the permit. One applicant claims property interest in Neck Point Residence Group, Spasski Bay, through a permit relinquished and subsequently issued to another person.

BLM argues that the facts in this appeal "[b]rings this appeal squarely within the decision set forth by this Board [ANCAB] in *Appeal of Kodiak Island Setnetters Ass'n*, 85 I.D. 200 (3 ANCAB 1, VLS 77-15; 1978)." In *Kodiak* each of the appellants alleged that they had been the holders of special use permits which entitled them to use certain described lands.

The Board held that:

> Sec. 14(g) protects existing permits as valid existing rights and provides that patent is to be subject to the right of the permittee to the complete enjoyment of all rights, privileges, and benefits granted to him. Once a permit expires, however, it is not an existing right and is not protected by § 14(g).

Documents filed with the Board by the Forest Service show that the permits for lots in the Gartina-Game Creek Residence Group tract were terminated for failure to comply with construction provisions of the permit.

[1] Since the permits were terminated for apparent cause, prior to

the expiration date of Dec. 31, 1980, this Board finds that appellants as original holders of the permits no longer have property interests which constitute valid existing rights and are protected by § 14(g) of ANCSA.

[2] The Board finds that, with regard to Lot 2, Neck Point Residence Group tract, the appellant, Mr. Schoonover, relinquished all property rights when he requested on Mar. 30, 1970, that his special use permit for Lot 2, Neck Point Residence Group be canceled and a permit for the same lot was subsequently issued to Mr. Charles Johnson. Where the holder of a Forest Service permit requested that his special use permit be canceled and the Forest Service did so and, subsequently, issued a special use permit for the same lot to another person, the original holder of the permit no longer has a property interest or a valid existing right derived from the permit which is protected as under § 14(g) of ANCSA.

[3] It should be noted that if the only interest in land claimed by appellants affected by the decision appealed were a terminated or relinquished special use permit, the appellants would be found to lack a property interest in land sufficient to confer standing under regulations in 43 CFR 4.902. However, BLM contends that if the appellants have any claim to the land it would have to be a claim against the village corporation pursuant to § 14(c)(1) of ANCSA.

The appellants assert that they
should be given priority, or
preference rights to purcha
Gartina-Game Creek Res
Group lots for which they onc
special use permits.

Sec. 14(c)(1) provide
follows:

> (c) Each patent issued pursu
> subsections (a) and (b) shall be
> to the requirements of this sub
> Upon receipt of a patent or paten
>
> (1) the Village Corporation sh
> convey to any Native or non-Nat
> cupant, without consideration, titl
> surface estate in the tract occupi
> primary place of residence, or as
> mary place of business, or as a
> ence campsite, or as headquart
> reindeer husbandry ·

[4] The Board held in *Ap*
James W. Lee that:

> [W]hile an appeal based on a
> interest created by § 14(c) of A
> *supra*, is premature if filed bef
> suance of interim conveyance, the
> lacks jurisdiction to decide such
> peal filed after interim conveyan
> issued. The result is that there
> administrative appeal process av
> to claimants under § 14(c), an
> claims must be brought in a
> forum.

Appeal of James W. Lee, 3 A
334, 343 (1979) [ANCAB VI
11].

This decision in no way
whatever right appellants
have to use and occupy the lan
to receive title to the land, pu
to § 14(c)(1). The Board do
decide the question of wheth
pellants are entitled to a conve
pursuant to § 14(c), or any qu
as to what they must receive
determined that they have
under § 14(c).

Based on the above findings and conclusions, this Board here Orders that the Decision of the Bureau of Land Management AA-6980-A is hereby affirmed.

This represents a unanimous decision of the Board.

Judith M. Brady
Administrative Judge

Abigail F. Dunning
Administrative Judge

Joseph A. Baldwin
Administrative Judge

APPEAL OF RECON SYSTEMS, INC.

IBCA-1214-9-78

Decided *January 17, 1980*

Contract No. 68-03-0293, Environmental Protection Agency.

Principal decision affirmed on Motion for Reconsideration

1. Rules of Practice: Appeals: Motions—Rules of Practice: Appeals: Reconsideration—Rules of Practice: Appeals: Statement of Reasons

The Government's motion for reconsideration, which contends that the current version of the Limitation of Cost clause does not entitle a contractor to additional funding for a change unless the contracting officer specifically increases the estimated cost, provides no basis for overturning the Board's principal decision allowing excess costs attributable to a construction change, where the contracting officer was given advance notice that the estimated costs would be exceeded and took no action to advise the contractor that no funding would be provided or to stop the project officer from asking for continued performance of the changed work.

APPEARANCES: Norman J. Weinstein, President, Recon Systems, Inc., Somerville, New Jersey, for appellant; Richard V. Anderson, Government Counsel, Cincinnati, Ohio, for the Government.

OPINION BY ADMINISTRATIVE JUDGE LYNCH

INTERIOR BOARD OF CONTRACT APPEALS

The Government requests reconsideration of the Board's decision of Sept. 25, 1979, which awarded partial costs of work required to be performed after expiration of the contract.

The Government argues that changes which had earlier been held to be outside the Limitation of Cost clause (LOCC), are now specifically included by specific language of the clause, that the contractor gave only a belated notice that the estimated costs would be exceeded, and that the contractor was a volunteer in completing the work without reliance on the expectation that additional funding would be provided.

The LOCC in the contract contains the following paragraph: "(d) Change orders issued pursuant to the 'Changes' clause of this contract shall not be considered an authorization to the Contractor to exceed the estimated cost set forth in the

Schedule in the absence of a statement in the Change order, or other contract modification, increasing the estimated cost." We accept the Government's contention that this specific language was included in the LOCC in order to make the cost limitation applicable to changes, and thereby avoid the effect of earlier Board findings to the contrary under the older clause. *Booz, Allen & Hamilton, Inc.*, IBCA-1027-3-74 (Mar. 24, 1976), [illegible] I.D. 95, 76-1 BCA par. 11,787, is cited to show this Board's recognition of the alteration of the rule. It should be noted that in that case, there was no notice given that the estimated cost would be exceeded and that the record there would not support a finding that the Government knew or should have known that costs would exceed the ceiling by reason of the added work of repairing Government property. *Booz, Allen & Hamilton, Inc., supra*, rejected appellant's argument that the new LOCC clause was inapplicable to constructive change orders, where the claim was based on repairs to Government property with the knowledge and acquiescence of the Government, but without knowledge of the impending overrun. However, in finding that the Government had not waived its discretion to fund the overrun, the Board stated: "This is so because absent unforeseeability or impossibility (n. 18, *supra*), the cases finding the Government obligated to fund an overrun are dependent upon actions of responsible Government officials, *e.g.*, urging continued performance
or demanding and accepting
benefits of performance,
knowledge of the overrun." (I
note omitted.) In the instant
we found that the contracting
cer received advance written n
of the exhaustion of the con
funds by reason of the appell
letter of Oct. 10, 1975, at which
no funds were being expended
der the contract. Subsequently
letter dated Oct. 22, 1975, the
ect officer requested appellant t
corporate the corrections
changes resulting from a gr
expanded Government review t
The work was completed by Ja
1976, and returned to the Go
ment. The Government accepte
completed work with full kn
edge of the fact that all th
quested work took place after n
that no contract funds were a
able.

With respect to the Governm
contention that appellant was
unteer in completing the work
out expectation that addit
funding would be provided, we
that finding agreements to v
teer, donate or cost share con
expenses are the exception r
than the rule, since there must
clear indication of the intent o
contractor to forego paymen
services required under a con
Appellant's letter of Oct. 10,
advising of the overrun sugges
such intention. The letter ac
that the overhead rate exceed
maximum allowable rate of the
tract and states: "We therefor
claim 100% overhead rate, resu

in an overrun on this contract." An earlier letter from appellant dated Aug. 13, 1975, advised a contract specialist on the staff of the contracting officer that the contract was not ready to be closed out because of the work remaining to be done after Government review comments on the draft report were received.

Despite the knowledge that funds were exhausted and that the work was not complete, the contracting officer did not respond to appellant's requests for funding the additional work for over 2 years. On Dec. 2, 1977, the contracting officer's letter indicated that: "Our program personnel advised us that there are no funds available to cover the cost overrun." The project officer was first asked about the availability of funds by a letter dated Nov. 16, 1977, from a contract specialist. The contracting officer failed to make a timely determination of the availability of funds and to advise the appellant accordingly, but rather allowed the final tasks under the contract to be sent to the contractor and the Government to accept and use the end product. The actions of the contracting officer were consistent with an intent to fund the additional work under the contract; and, only after learning that funds were not available 2 years after the added work was required did the Government raise the technical defense that the LOCC did not obligate the Government to provide the additional funding. The question of whether the additional funds to complete the contract would have been made available upon timely actions of the contracting officer is now moot. Failure to act resulted in the project officer ordering the added work and the acceptance by the Government of the benefits of the added work. In these circumstances, we confirm our finding that the Government must pay for the costs of the constructive change which resulted in costs over the contract ceiling being incurred after notice that the contract funds were fully expended.

Conclusion

The Board's principal decision of Sept. 25, 1979, is hereby reconfirmed.

Russell C. Lynch
Administrative Judge.

I concur:

William F. McGraw
Chief Administrative Judge

EASTOVER MINING CO.

2 IBSMA 5

Decided *January 21, 1980*

Petition for discretionary review, filed by Eastover Mining Company, of a July 16, 1979, decision by Administrative Law Judge William J. Truswell upholding Notice of Violation No. 79–II–4–3 issued by the Office of Surface Mining Reclamation and Enforcement in accordance with the Surface Mining

Control and Reclamation Act of 1977 and ordering payment of a civil penalty (Docket No. NX 9-23-P).

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures—Surface Mining Control and Reclamation Act of 1977: Notices of Violation.

The Office of Surface Mining Reclamation and Enforcement is authorized to issue a notice of violation for noncompliance with the initial regulatory program even if a state has already initiated enforcement action for the same violation.

APPEARANCES: Charles P. Gault, Esq., Office of the Field Solicitor (Knoxville), Walton D. Morris, Jr., Esq., and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement; Karl S. Forester, Esq., Harlan, Kentucky, for Eastover Mining Company.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

In this case we rely on the recitation of the procedural history and factual background provided in Administrative Law Judge (ALJ) Truswell's July 16, 1979, decision.[1]

We granted Eastover's petitic
for discretionary review fro
that decision to consider its obje
tion to dual enforcement actic
by the Office of Surface Minir
Reclamation and Enforcemer
(OSM) and the Commonwealth
Kentucky.[2]

---

[1] The "Background" and "Facts" portions of the ALJ's decision read in part as follows:

"In accordance with section 525 of the Surface Mining Control and Reclamation Act of 1977 (the Act), Eastover Mining Co. (applicant) applied on April 16, 1979, for review of the notice issued by the Office of Surface Mining Reclamation and Enforcement (respondent) under section 521(a)(3) of the
Act. Subsequently, on May 7, 1979, under se
tion 518 of said Act applicant applied for
view of a proposed civil penalty assessme
issued by respondent. Contemporaneous wi
the filing of this application, applicant,
accordance with the requirements of 43 CF
4.1152(b)(1), paid the full amount of t
proposed penalty ($5,800) to the Assessme
Office, Office of Surface Mining to be plac
in an escrow account pending a final detern
nation of the proposed assessment. A heari
was held before the undersigned in Harla
Kentucky, on June 7, 1979 at which time bo
cases were consolidated for hearing a
decision.

"Notice of Violation No. 79-II-4-3 w
issued on March 30, 1979, by the Office
Surface Mining for Eastover Mining Co
pany's Arjay Mine in Bell County, Kentuck
This is an underground mine and its sta
permit number is 207-5008. Said notice alleg
that Eastover Mining Company had violat
the provisions of 30 CFR 717.14(e) a
717.17. Three separate violations were
cluded in Notice of Violation No. 79-II-4-
Violation No. 1 was failure to pass all dra
age from the disturbed area through a se
mentation pond or series of sedimentati
ponds. Vioiation No. 2 was discharge from t
disturbed area fails to meet effluent limit
tions. Iron greater than 10 mg/1, PH le
than 6.0. Violation No. 3 was failure to cov
waste material from underground mine (whi
are deposited on land surface) with a mi
mum of four feet of nontoxic, noncombustib
material, failure to revegetate. The time f
abatement for all three violations was 8:
a.m., May 4, 1979.

"Respondent issued to applicant a Notice
Proposed Assessment of a civil penalty
$2,000 for Violation No. 1, $1,800 for Viol
tion No. 2, and $2,000 for Violation No. 3,
total of $5,800 for the three."
Decision at 1-2.

[2] In its petition Eastover also stated i
belief that the Administrative Law Jud
erred in holding that sec. 521(a)(1) of t
Act has no effect during the enforcement
the interim regulatory program. Since t
Board had previously held contrary to Ea
over's position in *Dayton Mining Co., Inc.*,
IBSMA 125, 86 I.D. 241 (1979), the Board
order granting the petition precluded revie
of that issue.

Eastover does not contend that the ALJ's decision upholding these violations is in error. Rather it asks to be relieved of responding to potentially different requirements prescribed by state and Federal enforcement agencies for the same or similar problems. Kentucky, it points out, had already issued enforcement documents requiring remedial measures to be taken with respect to the same conditions at its mine.

[1] It is not clear from the record that Eastover was in fact subjected to conflicting obligations. In any event, what is clear is that an OSM inspector is authorized to issue a notice of violation when he discovers noncompliance with the regulations. 30 CFR 722.12(a) provides that "[i]f an authorized representative of the Secretary finds a violation which is not covered by section 722.11 of this Part, [he] shall issue a notice of violation fixing a reasonable time for abatement." Judge Truswell held that this regulation disposes of the question.[3] We agree and we affirm.

Will A. Irwin
Chief Administrative Judge

Iraline G. Barnes
Administrative Judge

Melvin J. Mirkin
Administrative Judge

ZAPATA COAL CORP.

2 IBSMA 9

Decided *January 22, 1980*

Consolidated appeals from an order by Administrative Law Judge Tom M. Allen dated May 31, 1979, in Docket No. CH 9-101-R (IBSMA 79-20) dismissing an application for expedited review of a cessation order issued to Zapata Coal Corp. by the Office of Surface Mining Reclamation and Enforcement under the provisions of the Surface Mining Control and Reclamation Act of 1977 and from a decision by Judge Allen dated July 20, 1979, in Docket No. CH 9-86-R (IBSMA 79-32) vacating the cessation order for which Zapata had applied for review.

IBSMA 79-20 dismissed; IBSMA 79-32 reversed.

1. Surface Mining Control and Reclamation Act of 1977: Roads: Maintenance

A partially constructed access road, if used to facilitate mining operations, is a road for purposes of the initial regulatory program and therefore subject to the maintenance requirements of 30 CFR 717.17(j)(3)(i).

APPEARANCES: Marye L. Wright, Esq., Office of the Field Solicitor, Charleston, West Virginia, Shelley D.

---

[3] Concerning this issue, the ALJ wrote: "I can appreciate the position in which applicant finds itself. Hopefully matters of this type are thoroughly weighed before a notice of violation is issued or at least prior to a hearing. What can be considered here is the authority of OSM to issue the notice of violation and whether or not it has proved the violations. Part 721—Federal Inspections (30 CFR) provides at Section 721.11(a) [*sic*] for inspections on a random basis and at Section 721.13 for inspection based on citizen requests (Tr. 45–48). Either section would authorize the inspection in this case while Part 722—Enforcement Procedures (30 CFR) justify [*sic*] the action taken under the facts." Decision at 4.

Hayes, Esq., Office of the Solicitor, and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement; and A. L. Emch, Esq., of Counsel to Jackson, Kelly, Holt, & O'Farrell, Charleston, West Virginia, for Zapata Coal Corp.

OPINION BY THE BOARD OF SURFACE MINING AND RECLAMATION APPEALS

FACTUAL AND PROCEDURAL BACKGROUND

On Mar. 14, 1979, an inspector for the Office of Surface Mining Reclamation and Enforcement (OSM), acting under the authority of sec. 521(a)(3) of the Surface Mining Control and Reclamation Act of 1977 (Act),[1] issued to Zapata Coal Corp. (Zapata) a notice of violation alleging four separate violations of the Act and the initial program regulations at Zapata's Buffalo Mine No. 4 and prescribing periods for the abatement of each alleged violation. On May 4, another OSM inspector inspected the mine again and determined that two of the violations (No. 2 and No. 4 of the notice of violation) had not been abated. He issued a cessation order pursuant to sec. 521(a)(3) of the Act (30 U.S.C. § 1271(a)(3) (Supp. I 1977)) for those two violations.

On May 14, 1979, Zapata filed an application for temporary relief from the cessation order, and on May 18, 1979, Administrative Law Judge (ALJ) Tom M. Allen held a hearing on that application. At the hearing OSM objected to the proceeding because Zapata had not filed an application for review; OSM argued that that is a prerequisite to the consideration of an application for temporary relief. The ALJ rejected that position and proceeded with the hearing. At the conclusion of the hearing he granted temporary relief for 60 days from May 18, 1979, for violation No. 2 (of the cessation order) but denied it for violation No. 1.

On May 30, 1979, Zapata filed an application for expedited review of the cessation order. In an order dated May 31, 1979, the ALJ denied expedited review, citing 43 CFR 4.1181, which allows the filing of an application for expedited review of a cessation order only when temporary relief has not been granted. In pertinent part, the order reads, "Temporary relief having been granted, the applicant is not entitled to file a motion for expedited review and therefore said application for expedited review is dismissed." Zapata filed a notice of appeal with the Board from that order on June 7, 1979. The case was docketed as IBSMA 79-20 (Zapata I).

---

[1] 30 U.S.C. §§ 1201-1328 (Supp. I 1977).

Also on June 7, 1979, Zapata filed an application for review of the cessation order before the ALJ. He held a hearing on that application on June 14, 1979, and issued his decision on July 20, 1979. In that decision, he vacated the cessation order, having found there was no basis for the issuance of the underlying notice of violation with respect to the two alleged violations still in issue. OSM filed a notice of appeal from that decision on Aug. 17, 1979. The Board docketed that appeal as IBSMA 79-32 (Zapata II) and in an order dated Oct. 26, 1979, consolidated that appeal with IBSMA 79-20 and requested further briefing.

Those charges, contained in the original notice of violation, which underlay the cessation order, alleged noncompliance with the fill regulations in 30 CFR 717.14 and the road maintenance regulations in 30 CFR 717.17(j)(3)(i). Since its brief presented argument only on that portion of the ALJ's decision relating to the alleged road maintenance violation, OSM has effectively waived objection to the portion relating to the alleged fill violation.

The background to OSM's issuance of the notice of violation containing the alleged violations of the road maintenance regulations is as follows: In the summer of 1978, Zapata filed with the West Virginia Department of Natural Resources, Division of Reclamation, an application for an underground opening permit for its site. Within the area was a road used infrequently by a gas company for access to one of its facilities. Zapata's State permit application included a proposal to upgrade this mile-long road, because it also provided access to the "face-up" (the entry point of Zapata's proposed opening). The State authority issued the permit in September 1978, and Zapata worked on the road and the face-up until weather caused disruption of those activities in December. Zapata had not begun spring operations at the time of the OSM inspection in March 1979.

DISCUSSION

Having consolidated the appeals, the Board is of the opinion that issues raised in Zapata I are moot and therefore that appeal is dismissed.[2] The Board therefore turns to the issue, raised in Zapata II, of whether the access road was used to facilitate mining, thereby subjecting it to the maintenance requirements of 30 CFR 717.17(j)(3)(i). Zapata argues that the pre-existing access road, which was in use, was under construction pursuant to specifications in a State approved permit and thus should not be subject to the maintenance requirements of sec. 717.17(j)(3)(i). OSM argues that whether or not the road was

---

[2] The 60-day temporary relief order period has passed, and in a subsequent hearing on the merits, the ALJ decided the case in Zapata's favor. We suggest, however, that where a cessation order lists more than one violation, 43 CFR 4.1181 may not preclude expedited review of those violations for which temporary relief has not been granted.

"finished" according to the State permit is irrelevant. If Zapata used it to facilitate mining operations, then it was a "road" for purposes of the regulations and subject to the maintenance requirements. The ALJ in vacating the violation determined that the road was under construction, and that thus no violation existed under sec. 717.17(j)(3)(i). We disagree with his determination.

[1] The definition of "road" in 30 CFR 710.5 reads in part:

> ***Roads*** **means** ***access*** **and haul roads constructed,** ***used,*** **reconstructed, improved, or maintained for use in surface coal mining and reclamation operations, including use by coal hauling vehicles leading to transfer, processing, or storage areas. The term includes any such road used and not graded to approximate original contour within 45 days of construction other than temporary roads used for topsoil removal and coal haulage roads within the pit area. [Italics added.]**

There is evidence in the record that the road was used to facilitate work at the face-up and to construct a fill from material removed from the opening (Tr. I 30–33, 67–68, 71, 98–99, 117, 163).[3] There is further evidence in the record that four truck loads of coal (50–60 tons) had been removed from the face-up area (Tr. II 69–71). In removing this coal, Zapata had to pass over the access road. The issue of lack of maintenance was essentially not in dispute (Tr. I 53–54, 66, 72–73, 139).

We therefore conclude that in view of the activity conducted on the access road, and its condition, it fell within the regulatory definition of a road and was not maintained in accordance with sec. 717.17(j)(3)(i).[4]

The ALJ's decision on this question is reversed.

Iraline G. Barnes
Administrative Judge

Will A. Irwin
Chief Administrative Judge

Melvin J. Mirkin
Administrative Judge

KIN-ARK CORP.

45 IBLA 159

Decided *January 23, 1980*

Appeal from the decision of the New Mexico State Office of the Bureau of Land Management rejecting preference right coal lease application NM 11916.

Vacated and remanded.

1. Administrative Procedure: Adjudication—Application and Entries: Valid Existing Rights—Coal Leases and Permits: Generally—Regulations: Applicability

Where the holder of a coal prospecting permit completes his exploration and applies for a preference right coal lease in

---

[3] "Tr. I" refers to the transcript of the hearing held on May 18, 1979. "Tr. II" refers to the transcript of the hearing held on June 14, 1979.

[4] Even if Zapata's activity could fairly be characterized as facilitating construction of a road pursuant to the State permit approved by the State, such State approval cannot operate to relieve Zapata of its obligations under the interim regulations. (*See* 30 CFR 710.11(a)(3); *Alabama By-Products Corp.*, 1 IBSMA 239, 243, 86 I.D. 446, 448 (1979).)

1973, the application must be adjudicated on the basis of the applicant's subsequent conformity with regulations amended in 1976 with retroactive effect. However, where the application is summarily rejected solely for the reason that the applicant's supplemental submission is "inadequate," without identifying the deficiency, the decision will be vacated and the case remanded for readjudication.

APPEARANCES: William F. Carr, Esq., Santa Fe, New Mexico, for appellant.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

INTERIOR BOARD OF LAND APPEALS

On Dec. 1, 1970, the New Mexico State Office of the Bureau of Land Management (BLM), issued to Hoover H. Wright a 2-year coal prospecting permit for 2,880 acres in T. 24 N., R. 13 W., New Mexico principal meridian. After a 1-year extension Wright apparently had not completed his exploration program when he assigned the permit to Kin-Ark Corp. This assignment was approved by BLM on Jan. 15, 1973.

Kin-Ark, apparently hampered by a shortage of time remaining in the permit and unavailability of drilling equipment, nevertheless managed to complete the exploration and submit its application for a preference right coal lease on Nov. 29, 1973—one day prior to the expiration of the permit.

The imposition of a Secretarial moratorium on the issuance of coal leases and permits caused BLM to suspend action on the adjudication of Kin-Ark's lease application. *See* *Krueger* v. *Morton*, 539 F.2d 235 (D.C. Cir. 1976); *Hunter* v. *Morton*, 529 F.2d 645 (10th Cir. 1976). While the application was pending, Congress enacted the Federal Coal Leasing Amendments Act of 1975 (FCLAA), 90 Stat. 1083; 30 U.S.C. § 201(b) (1976). Meanwhile, the Department revised its regulations relating to coal leasing—43 CFR Part 3520—on May 7, 1976. One of the revised regulations, 43 CFR 3521.1-1(b), required applicants for preference right coal leases to support their applications by the submission of significantly more material and information than was required theretofore under the regulation in effect at the time Kin-Ark's application was filed, *i.e.*, 43 CFR 3521.1-1(b) (1973).

By its decision dated June 29, 1976, BLM called upon Kin-Ark to support its application with the additional "data and information" required by the revised regulation. Kin-Ark requested and was granted two extensions of time to make this submission. Certain information was then filed by Kin-Ark, although the record before us does not reveal exactly what it was, as it was transmitted to Geological Survey by BLM, and apparently retained there. However, a copy of BLM's transmittal memo, dated Sept. 6, 1977, states:

> Enclosed is the information submitted by Kin-Arc [*sic*] Corporation in support of their coal preference right lease application NM 11916

> The information has been submitted in response to our June 29, 1976 Decision and as required by the attached Notice and regulations contained in Circular 2390.[1]

By decision of that same date (Sept. 6, 1977) BLM required Kin-Ark to submit, at its expense, "a certified abstract from a qualified abstractor, as to the presence of any mining claims (located prior to the date of issuance of the permit), embracing all or part of the public land area under the * * * permit," as required by Instruction Memorandum No. 77-410 dated Aug. 18, 1977, from the Acting Director, BLM. The record does not show that Kin-Ark submitted an abstract.

On Feb. 5, 1979, the Area Mining Supervisor, Geological Survey, wrote a memorandum to BLM's Chief of Lands and Minerals Operations, Santa Fe, which memo dealt with the status of the subject application in one terse, conclusory sentence, viz: "We have received the additional data for NM 11916 from you, but the data is still inadequate under the requirements for the initial showing published in 1976 for all preference right lease applications for coal."

Without inquiring as to how or why Survey considered that "the data is still inadequate" BLM issued a decision on May 3, 1979, rejecting Kin-Ark's preference right lease application, giving as its sole reason for so doing that the data furnished by Kin-Ark in response to BLM's decision of June 29, 1976, "[H]as been examined and found to be inadequate" to meet the requirements of the 1976 amendment of 43 CFR 3521.1-1(b). Kin-Ark has appealed.

[1] We begin with the observation that notwithstanding any other aspect of the case, the rejection of the application solely for the reason that someone has said that it is "inadequate," without any specification of the nature of the deficiency or any consideration of whether the deficiency was fatal or remediable, major or insignificant, requires us to strike the decision down. There was no stated basis for the action; it left the appellant in ignorance of the reason for the rejection and unable to respond, and it provided this Board with nothing to adjudicate on appeal. Indeed, the initial decision cannot be characterized as the product of "adjudication," as it appears that its author had no more comprehension of what was supposedly wrong with the application than has been communicated to the rest of us. Such a decision must be treated as arbitrary and capricious. *See Charles E. Hinkle*, 40 IBLA 250 (1979); *Steven and Mary J. Lutz*, 39 IBLA 386 (1979). An appeal by one adversely affected by a decision is subject to dismissal if the appellant "fails to point out how the decision appealed from is in error" and how he "has improperly been deprived of some right." *Duncan Miller*, 41 IBLA 129 (1979). Therefore, unless the decision states a specific reason for the action taken,

---

[1] The circular referred to contains the revised regulations excerpted from Title 43, *Code of Federal Regulations*.

an appellant is usually left helpless to make an appeal on the merits of his application.

However, in this case appellant has chosen to ground its appeal on its assertion that it cannot be required to meet the requirements of the 1976 revised regulations, as it had already established its right to receive a lease as a matter of law by its alleged demonstration of a discovery of commercial coal in accordance with the requirements of the regulations in 1973.

As noted above, appellant had completed its approved program of exploration, asserted a discovery of commercial coal, and filed its application for a preference right coal lease on Nov. 29, 1973, prior to the expiration of the term of its prospecting permit. All of this was allegedly done in compliance with the requirements of the statute and regulations then in effect.

The statute, 30 U.S.C. § 201(b) (1970), provided:

> Where prospecting or exploratory work is necessary to determine the existence or workability of coal deposits in any unclaimed, undeveloped area, the Secretary of the Interior *may issue*, to applicants qualified under this chapter, prospecting permits for a term of two years, for not exceeding five thousand one hundred and twenty acres; and *if within said periods of two years thereafter the permittee shows to the Secretary that the land contains coal in commercial quantities, the permittee shall be entitled to a lease under this chapter for all or part of the land in his permit.* [Italics added.]

This language invested the Secretary with the authority to grant or refuse a prospecting permit at discretion, "may issue" being the operative verb phrase. However, once the permit was issued, the Secretarial discretion afforded by the statute was fully and finally exercised. Thereafter, the right of the permittee to receive a lease was controlled by his success in demonstrating to the Secretary that the land contained coal in commercial quantities. If he did so, that statute declared, "[T]he permittee shall be entitled to a lease * * *." The Department has long taken the position that, notwithstanding its use of the term "preference right lease," the Secretary has no discretionary power under the statute to refuse to grant the lease, and the applicant who meets all the statutory and regulatory requirements becomes entitled to a lease of the discovered deposit as a matter of law. *J & P Corp.*, 13 IBLA, 83 (1973); *Peter I. Wold*, II, 13 IBLA 63, 80 I.D. 623 (1973); *Emil Usibelli*, 60 I.D. 515 (1951); *Leonard E. Hinkley*, A-26187 (June 12, 1951). In fact, it appears that in years past the Department's recognition of the absolute right of a successful prospecting permittee to the coal which he had discovered was even more clearly viewed than recently. In *Emil Usibelli*, *supra*, the Solicitor of this Department held:

> Where the holder of a coal prospecting permit, as the result of prospecting work done on the land covered by the permit, has demonstrated

that the land contains coal in commercial quantities and has submitted an application for established policy of the Department permits the applicant to begin the commercial mining of coal from the land without awaiting the actual issuance of a lease to him. [60 I.D. 516.]

While it can no longer be said that this represents Departmental policy, due to environmental and other considerations, the rule of law emphasized by *Usibelli* and the other decisions cited remains unaltered. *N.R.D.C.* v. *Berklund*, 458 F. Supp. 925 (D.D.C. 1978), *aff'd*, Civ. No. 78-1757 (D.C. Cir. Nov. 9, 1979). *See* discussion and notes, Fairfax and Andrews, *Debate Within and Debate Without*, 19 Natural Resources Journal 505, 519-22 (1979).

The question remaining, then, is whether a permittee who has completed his exploration, allegedly discovered commercial coal, timely filed his application for a lease, and supported that application with the showings required by regulation in 1973, can have that application rejected for failure to meet the more onerous requirements imposed by the 1976 revision of that regulation. We answer in the affirmative.

Kin-Ark argues that as it was entitled to a lease as a matter of legal right in 1973, it should not be divested of that right by the promulgation of a subsequent regulation which is applied by BLM with retroactive effect. Indeed, appellant argues with considerable force that because the Congress empowered the Secretary to adopt general regulations to implement the leasing provisions of the basic Act (30 U.S.C. § 201(a) (1970)), the newly promulgated regulations are legislative in character. It is maintained that the general rule concerning the retroactive application of administrative regulations includes the power to give them retroactive effect, provided they do not conflict with restrictions on legislative power relating to retroactive laws, such as, for instance, the disturbance of vested rights, citing 2 Am. Jur. 2d, *Administrative Law* § 308 (1962).

"An administrative regulation, especially one which has the effect of creating an obligation, cannot be construed to operate retroactively *unless the intention to that effect unequivocally appears.*" *Miller* v. *United States*, 294 U.S. 435, 439 (1935), *reh. denied*, 294 U.S. 734 (1935). As they now appear in the *Code of Federal Regulations* there is no "unequivocal" manifestation of any intent to make the revision of 43 CFR Groups 3400 and 3500 regulations retroactive, but when published as proposed rulemaking and again upon final rulemaking, such an intention was clearly stated. On Jan. 19, 1976, when the revision of the subject regulations was published in the *Federal Register* as proposed rulemaking, the Department stated at 41 FR 2648 (Jan. 19, 1976): "If adopted, the Department will apply the proposed regulations to all pending and future applications for leases by prospecting permittees, but will not reexamine leases that were issued prior to the effective date of these regulations."

On May 7, 1976, when the revision of 43 CFR 3521.1-1 was published as final rulemaking, the regulation was preceded by a description of comments received following the publication of the proposed revision, and the Department's reaction or response to each. The general tenor of this discussion indicates in several places that it was contemplated that the revised regulations would apply to preference right lease applications which were then pending, but, in addition, this issue was addressed directly and specifically at 41 FR 18845 (May 7, 1976), viz:

> 3. Request that this standard not apply to permits granted before the effective date of the regulation. 3520.1-1(d). This section stated that the regulations would apply to applications for leases pending on the effective date of this regulation. The Department has full legal authority to adjudicate pending applications for leases under the standards adopted by these regulations. As a question of policy, it has determined that the public interest would not be fully protected unless these applications for leases are examined under what the Department believes is the correct interpretation of the statute.

Thus, there can be no gainsaying that appellant had clear constructive notice that the revised regulation(s) would be applied to its then pending lease application.

Appellant also argues that since it had established its legal entitlement to receive a lease pursuant to the regulatory criteria existing in 1973, that right cannot be defeated by the more demanding criteria of the 1976 revised regulation, because the Federal Coal Leasing Amendments Act of 1975, *supra*, specifically provides that its amendment of sec. 2(b) of the Mineral Lands Leasing Act (30 U.S.C. § 201(b) (1976)) is "subject to valid existing rights." Therefore, says appellant, the revision of 43 CFR 3521.1, having been promulgated to implement the Federal Coal Leasing Amendments Act, cannot do what the Act expressly prohibits, *i.e.*, adversely affect its pre-existing entitlement to a lease. However, this argument suffers a fallacious premise. The 1976 revision of the coal leasing regulations was *not* done to implement The Coal Leasing Amendments Act but, rather, these revisions were promulgated pursuant to the authority of "the Mineral Leasing Act of 1920; as amended and supplemented 30 U.S.C. 181-287," (*sic*) "under section 402, Reorganization Plan No. 3, 60 Stat. 1009," and the "National Environmental Policy Act of 1969 (NEPA) 42 U.S.C. 4321-35." *See* 42 FR 2648 (Jan. 19, 1976). In fact, the "Federal Coal Lease Amendment Act of 1975" was not enacted into law until Aug. 4, 1976, some 3 months *after* the promulgation of the revised regulations as final rulemaking.[2]

The saving clause in the Federal Coal Leasing Amendments Act which preserves "valid existing rights" undoubtedly encompasses appellant's then pending application for a preference right lease, so that nothing in that Act could affect appellant's right to receive a lease. But nothing in that Act, or in any regulation promulgated to implement that Act, *has* adversely affected appellant's right to receive its lease. As the Act eliminated the prospecting permit/preference right mechanism for acquiring a coal lease, the clause exempting those with "valid existing rights" merely made it possible for pending applicants to receive preference right leases thereafter *if* they showed themselves to be qualified. The Department, in revising 43 CFR 3521.1, was engaged in defining the showing that would be necessary to demonstrate such qualification. Since under the then pending legislative amendment there would be no *new* preference right lease applicants, the revision could only apply to those who fell within the definition of the "valid existing rights" provision recited in the Federal Coal Lease Amendments bill. Thus, the revision of the regulation was accomplished in full anticipation that "valid existing rights" would be preserved by the Act, rather than in disregard of that provision in the bill then pending.[8]

---

[2] Subsequently, the Congress, in recognition of the date of the Act, formally changed its title to the "Federal Coal Leasing Amendments Act of 1976." Sec. 8, P.L. 95-554, 92 Stat. 2075 (1978).

The amended regulations wer intended, *inter alia*, to properl define the statutory reference t "commercial quantities," and t meet the enhanced responsibility c the Department with regard to er vironmental concerns. The pr priety of and necessity for such a tion was articulated in *Utah Inte national Inc.* v. *Andrus*, Civ. N C77-0225 (D. Utah CD June 1 1979). *See Global Exploration Development Corp.* v. *Andrus*, Ci No. 78-0642 (D.D.C. Aug. 1 1978).

We conclude that appellant obliged to make the submissions r quired by the amended regulatio in order to "show to the Secretar that its alleged discovery of coal such as will qualify it to receive lease with terms and conditions a propriate to other public intere considerations.

Accordingly, pursuant to the a thority delegated to the Board Land Appeals by the Secretary the Interior, 43 CFR 4.1, the de sion appealed from is vacated a the case remanded for readjudic tion.

Edward W. Stuebing
Administrative Judge

We concur:

James L. Burski
Administrative Judge

Douglas E. Henriques
Administrative Judge

---

[8] The Department was justified in this anticipation by the Senate Committee Report published July 23, 1975, which included the following:

"Section 102 also adds a new subsection 2(c) to the 1920 Act which gives express authority for coal exploration permits.

"The Commitee wishes to stress that the repeal of a Subsection 2(b) is expressly 'subject to valid existing rights' and thus is not intended to affect any valid prospecting permit outstanding at the time of enactment of the amendments. Any applications for preference right leases based on such permits could be adjudicated on their merits and preference right leases issued *if the requirements of Subsection 2(b) of the 1920 Act and other applicable law, such as the National Envi mental Policy Act of 1969, were met.*" (Ita added.) S. Rep. No. 94-296, 94th Cong., Sess. 7 (1975).

CITY OF ANCHORAGE, ALASKA, & JACK G. FISHER, ET AL., A.K.A. CONCERNED CHUGACH CITIZENS V. CHUGACH ELECTRIC ASS'N, INC.

45 IBLA 171

Decided *January 30, 1980*

Appeal from a decision of the Alaska State Office, Bureau of Land Management, dated Apr. 16, 1979, approving right-of-way Alternative K for the alignment of Chugach Electric Association's 230-kV transmission line.

Affirmed.

1. National Environmental Policy Act of 1969: Generally—Federal Land Policy and Management Act of 1976: Rights-of-Way—Rights-of-Way: Generally—Rights-of-Way: Federal Land Policy and Management Act of 1976

Public Land Order No. 2676 (1962), requires the approval of an authorized officer of the Department of the Army before the Secretary of the Interior can grant a right-of-way over lands subject to the public land order. The Department of the Interior has no authority to grant a right-of-way where the approval is withheld.

2. Rights-of-Way: Generally

In reviewing a decision to grant a right-of-way based upon an environmental analysis report, the decision will be upheld where the record evidences consideration of all available information and a reasoned analysis of the factors involved, made in due regard for the public interest.

APPEARANCES: Olaf K. Hellen, Esq., Anchorage, Alaska, for City of Anchorage and Concerned Chugach Citizens; Carl J. D. Bauman, Esq., Anchorage, Alaska, for Chugach Electric Association; Russell L. Winner, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for BLM.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

INTERIOR BOARD OF LAND APPEALS

The city of Anchorage, Alaska, and a group of individuals, styling themselves Concerned Chugach Citizens,[1] appeal from a decision of the Alaska State Office, Bureau of Land Management (BLM), approving right-of-way Alternative K for the alignment of Chugach Electric Association's (CEA) 230-kV electric transmission line.

The 18-mile transmission line is part of a large project funded by a Rural Electrification Administration (REA) loan. The REA determined that the loan involved "major Federal action" requiring an environmental impact statement (EIS). An environmental analysis prepared by a consulting firm retained by CEA was incorporated into the REA prepared EIS.

On Jan. 9, 1978, CEA applied to BLM for a right-of-way grant for the portion of the transmission line scheduled to cross Federal lands. BLM prepared an environmental assessment record (EAR) to supplement the other environmental documents.

---

[1] The individual named appellants who comprise the group calling itself Concerned Chugach Citizens are Jack G. Fisher, Nancy Fisher, Kenneth R. Harper, Susan Harper, Patrick A. Stanfield, and Richard R. Thiel.

The EAR studies 11 alternative routes for the transmission line in addition to the route proposed by CEA. The EAR concentrated on a 1-mile section of the right-of-way that did not utilize existing rights-of-way and involved the border between the eastern boundary of the Chugach Foothills and Pleasant Valley subdivisions of Anchorage and a portion of the western boundary of Fort Richardson military reservation. The selection process generated considerable public response, particularly from the citizens whose homes border Fort Richardson.

As the evaluation process progressed, the Army announced that Alternatives designated "A" and "B" intruded too far into the Army reservation and would interfere with their training exercises. At that time the military indicated that it would not oppose a right-of-way located 300 feet from the western boundary of the reservation. The proposed right-of-way located 300 feet inside Fort Richardson became Alternative K, the route ultimately approved in the Decision Record/Rationale.

The Decision Record/Rationale of Apr. 16, 1979, signed by Curtis McVee, Alaska State Director, states:

> ***Decision:***
>
> **I approve Alternative K for the alignment of Chugach Electric Association's (CEA) request for a 230-KV transmission line right-of-way from Knik Arm to University substation.**
>
> ***Rationale:***
>
> **The EAR and the Land Report for this project analyze the proposed action and the eleven alternatives developed for consideration. The reasons that I have approved Alternative K are:**
>
> **1. it is more cost effective than the underground alternatives and has little cost difference from the parallel aboveground alternatives;**
>
> **2. it is more reliable than underground alternatives when one considers that high voltage underground installations are untried and unproven in Alaskan frost conditions and that delays in repairing such underground circuits can take up to two weeks or longer;**
>
> **3. it impacts the least number of residences and it allows future expansion of the right-of-way without conflicts with residential housing, by providing a buffer of natural vegetation between the power line and the housing area which directly borders the military reservation;**
>
> **4. it would conform with plans for the East City Bypass and not conflict with the Far North Bicentennial Park Plan;**
>
> **5. it will insure that the military can continue its training operations in an uninterrupted manner. The Regional Solicitor has determined that this office has no authority to permit land use on the military withdrawal without concurrence by the Department of the Army.**
>
> **The Rural Electrification Administration, U.S. Department of Agriculture, has prepared an Environmental Impact Statement on CEA's proposal for upgrading its electric transmission system (Beluga Station No. 7 and No. 8, Bernice Luke Power Plant Unit No. 3, 230-KV Transmission Additions, January, 1978). The Environmental Assessment Record (EAR-010-8157), which BLM has prepared, supplements this EIS in areas which the U.S. Department of Interior felt were not fully analyzed. Therefore, I do not feel another EIS is necessary**
>
> **Alternative K, including all mitigation measures which were recommended in the EAR, is approved.**

Appellants argue that BLM's decision, based upon the various reports, is a violation of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321–4335 (1976), and the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701–1781 (1976).

Appellants' objection to the selection of Alternative K over Alternative B is primarily aesthetic.[2] The transmission line following Alternative K will impair the view from the houses in the subdivisions of the Chugach Mountains to a greater extent than if Alternative B were used.

The BLM decision approving Alternative K as the route of the transmission line is challenged by appellants on numerous specific grounds. Appellants most substantial arguments are: 1) BLM should have attempted to have Public Land Order (PLO) No. 2676 modified to negate the military's opposition or alternatively, the rationale of the military's opposition to Alternative B should have been further analyzed and reviewed by BLM to reflect the reasons for the military's opposition; 2) Alternative K should not have been chosen because it is inconsistent with the Anchorage Metropolitan Area Transportation Study (AMATS); and, 3) The selection of Alternative K results from the inadequate weighing of alternatives, a failure to consider all available information, a failure to properly analyze the factors involved, and a disregard for public interest.

[1] Pursuant to PLO 2676 (May 4, 1962) the land in question was again placed under the jurisdiction of the Department of the Army.[3] The Authority to grant rights-of-way over the land

---

[2] Appellants had argued earlier that Alternative K posed a greater danger to nearby residents and to their property than did Alternative B. This argument was essentially abandoned at oral argument.

[3] The land was temporarily withdrawn and placed under the control and jurisdiction of the War Department for use as a military reservation pursuant to Exec. Order No. 8102 (Apr. 29, 1939). Exec. Order No. 9526 (Feb. 28, 1945) amended Exec. Order No. 8102 to return jurisdiction to the Department of the Interior 6 months after termination of the national emergency. On May 4, 1962, PLO 2676 transferred jurisdiction back to the Army. PLO 2676 provides:

"ALASKA

"Amending Certain Orders Which Withdrew Lands for Use of the War Department for Military Purposes

"By virtue of the authority vested in the President, and pursuant to Executive Order No. 10355 of May 26, 1952, it is ordered as follows:

"1. Executive Orders No. 8102 of April 29, 1939; No. 8343 of February 10, 1940; No. 8755 of May 16, 1941; No. 8847 of August 8, 1941, and Public Land Orders No. 47 of October 12, 1942, and No. 95 of March 12, 1943, which withdrew public lands in Alaska for use of the War Department for military purposes, are hereby amended to the extent necessary to delete therefrom the following paragraph included therein, or added thereto by Executive Order No. 9526 of February 28, 1945, or Public Land Order No. 284 of June 12, 1945:

" 'The jurisdiction granted by this order shall cease at the expiration of the six months' period following the termination of the unlimited national emergency declared by Proclamation No. 2487 of May 27, 1941 (58 Stat. 1647). Thereupon, jurisdiction over the lands hereby reserved shall be vested in the Department of the Interior, and any other department or agency of the Federal Government according to their respective interests then of

Continued on page 24.

remained with the Secretary of the Interior with the limitation that no grants would be made without the approval of an authorized officer of the Department of the Army.

Sec. 204(i) of FLPMA, 43 U.S.C. § 1714(i) (1976) restricts the Secretary of the Interior's authority to modify or revoke withdrawals. Sec. 204(i) provides: "In the case of lands under the administration of any department or agency other than the Department of the Interior, the Secretary shall make, modify, and revoke withdrawals only with the consent of the head of the department or agency concerned, except when the provisions of subsection (e) of this section apply."

Subsection (e) provides that the Secretary of the Interior may make an emergency withdrawal when he determines "that an emergency situation exists and that extraordinary measures must be taken to preserve values that would otherwise be lost."

We note that sec. 204(e) is not, by its terms, specifically applicable to the revocation or modification of withdrawals as opposed to their formulation. Assuming without deciding that subsection (e) would be applicable to revocation of a withdrawal, appellants have not argued nor does the case record disclose that the military's objection to Alternative B has created such an emergency situation. Thus, under either theory, sec. 204(i) of FLPMA prevents the Secretary from modifying PLO 2676 to override the military's objection to Alternative B.

Appellants have also argued that BLM had an affirmative duty both to independently evaluate the basis for the military's objection and, if unconvinced of the merits of the Army's concerns, to endeavor to change the military's decision. While this Board is not unmindful of the Department's obligation under numerous statutes to safeguard the environment to as great an extent as possible, we also recognize that:

> There is reason for concluding that NEPA was not meant to require detailed discussion of the environmental effects of "alternatives" put forward in comments when these effects cannot be readily ascertained and the alternatives are deemed only remote and speculative possibilities, *in view of basic changes required in statutes and policies of other agencies—making them available, if at*

Continued from page 23.

record. The lands, however, shall remain withdrawn from appropriation as herein provided until otherwise ordered.'

"2. The orders of withdrawal referred to in paragraph 1, above, are hereby further amended by substituting the words 'Department of the Army' for the words 'War Department' wherever they appear.

"3. The Department of the Interior shall retain jurisdiction of the mineral and vegetative resources of the lands.

"4. The Department of the Army may issue permits revocable at will for authorized use of the lands included in this order; but authority to change the use specified by this order or to grant rights to others to use the lands, including grants of leases, licenses, easements and rights-of-way is reserved to the Secretary of the Interior or his authorized delegate, provided that no grants will be made under this authority without the approval of an authorized officer of the Department of the Army.

"John A. Carver, Jr.,

"Assistant Secretary of the Interior.

"May 4, 1962.

"[F.R. Doc. 62-4581; Filed, May 10, 1962; 8:46 a.m.]"

> *all, only after protracted debate and litigation not meaningfully compatible with the time-frame of the needs to which the underlying proposal is addressed.* [Italics supplied.]

Vermont Yankee Nuclear Power Corp. v. *NRDC*, 435 U.S. 519, 551 (1978), *citing NRDC* v. *Morton*, 458 F.2d 827, 837–38 (1972).

While situations might arise in which BLM might be required to attempt to alter the view of a sister agency, such a situation is not disclosed by the facts of this appeal. Such necessity might arise where the only environmentally or economically feasible alternative for a needed project crosses or encroaches upon land which is under the jurisdiction of another agency, and the local official of that agency has, with no discernible justification, refused consent. It would also have to be shown that all other alternatives result in grave environmental or economic depredations. In such a circumstance, BLM might well be required to undertake to have the local official's decision reversed. For a number of reasons, such is not the situation disclosed herein.

First, while Alternative K may have a greater aesthetic impact upon appellants, it can clearly not be said to be totally environmentally unacceptable. Moreover, while appellants argued that BLM is obligated under NEPA to choose the alternative which has the least environmental impact, the Supreme Court has recently addressed this precise question. In *Strycker's Bay Neighborhood Council, Inc.* v. *Karlen*, 48 L.W. 3433 (Jan. 8, 1980), the Court, in a per curiam decision, stated:

> Vermont Yankee [*supra*] cuts sharply against the Court of Appeals' conclusion that an agency, in selecting a course of action, must elevate environmental concerns over other appropriate considerations. On the contrary, once an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences; it cannot "interject itself within the area of discretion of the executive as to the choice of the action to be taken."

48 L.W. at 3434. While this Board, as the Secretary's agent, can exercise executive discretion, the Court's decision clearly stands for the proposition that considerations other than environmental impacts are properly weighed in the decisionmaking process.

[2] From our review of the EAR it is clear that BLM not only obtained sufficient information to satisfy sec. 204(e), but also adequately reviewed the Army's reasons for its opposition to Alternative B.

The Army did not directly supply BLM with all of the documentation supporting its opposition to Alternative B. A portion of the information was ultimately released by the Army to Senator Stevens' office and eventually provided to BLM and included in the final

EAR. Both the Army's lack of consent and the reason for this opposition are mentioned in the decision rationale.

Appellants contend that the selection of Alternative K is inconsistent with a potential freeway route proposed by AMATS. Appellants' major concern is that when and if the freeway is built it will be routed between their homes and the routing of Alternative K. The EAR recognizes that such a routing is possible but concludes that the more probable placement will locate the freeway further from the homes than the power line, preserving the desired buffer zone.

The freeway under consideration by AMATS is only a proposal. A determination has not been made as to the exact location of the freeway. While BLM could have been faulted for totally ignoring the freeway study, in light of the speculative nature of the freeway, sufficient attention was given the proposal in the EAR. *See County of Suffolk* v. *Secretary of the Interior*, 562 F.2d 1368 (2nd Cir. 1977), *cert. denied*, 434 U.S. 1064, 98 S. Ct. 1238 (1978).

Appellants generally challenge the adequacy of the EAR and are critical of the decision process that led to the selection of Alternative K.

On arriving at its decision, BLM must consider all available information. The record must evidence a reasoned analysis of the factors involved made in due regard for the public interest. The decision will be upheld unless appellants can show sufficient reason to change the result. *Dean W. Rowell*, 37 IBLA 387 (1978); *Robert L. Healy*, 35 IBLA 66 (1978); *Broken H Ranch Co.*, 34 IBLA 182 (1978).

We are not persuaded that sufficient reason exists to change the result. The EAR adequately considers the maintenance and operating units of the proposal and the alternatives. The environmental consequences including the impact upon the air, land, water, plants, animals, and human values were thoroughly considered by BLM and are reflected in the Decision/Record Rationale. BLM made a special effort to take into account the viewpoints and concerns of both the immediate residents and the Muncipality of Anchorage.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Frederick Fishman
Administrative Judge

We concur:

James L. Burski
Administrative Judge

Douglas E. Henriques
Administrative Judge

U. S. GOVERNMENT PRINTING OFFICE : 1980 O - 312-980

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

THE EXTENT TO WHICH THE NATIONAL HISTORIC PRESERVATION ACT REQUIRES CULTURAL RESOURCES TO BE IDENTIFIED AND CONSIDERED IN THE GRANT OF A FEDERAL RIGHT-OF-WAY*

M-36917

December 6, 1979

1. National Historic Preservation Act: Generally—Rights-of-Way: Conditions and Limitations.

Sec. 106 of the National Historic Preservation Act requires an agency granting a right-of-way over Federal lands for a pipeline or other linear project to (1) identify potentially affected cultural resources; (2) consult regarding such effect with the Advisory Council on Historic Preservation; and (3) to consider these cultural resources in making or denying the grant. A rule of reason applies as to the scope of the lands to be inventoried, and the degree of effort required.

2. National Historic Preservation Act: Applicability—Rights-of-Way: Generally—Rights-of-Way: Conditions and Limitations.

The grant of a right-of-way over Federal land for a pipeline or other linear project is a Federal undertaking which requires the authorizing agency to comply with sec. 106 of the National Historic Preservation Act, as implemented by 36 CFR Part 800.

3. National Historic Preservation Act: Applicability—Rights-of-Way: Conditions and Limitations.

Sec. 106 of the National Historic Preservation Act requires an agency granting a right-of-way over Federal lands for a pipeline or other linear project to identify and consider cultural resources on non-Federal lands affected by construction activities on Federal lands. 36 CFR 800.4(a).

4. National Historic Preservation Act: Applicability—Rights-of-Way: Conditions and Limitations.

Sec. 106 of the National Historic Preservation Act requires an agency granting a right-of-way over Federal lands for a pipeline or other linear project to identify and consider cultural resources on non-Federal lands which may foreseeably be affected by the grant of the right-of-way. A rule of reason applies in determining the extent of non-Federal lands on which cultural resources are to be identified, and the degree of effort required. 36 CFR 800.4(a)

5. National Historic Preservation Act: Applicability—Rights-of-Way: Conditions and Limitations.

In the grant of a right-of-way over Federal lands for a pipeline or other linear project, the scope of lands to which the requirements of sec. 106 of the National Historic Preservation Act apply may be analogous to the scope of lands to be considered pursuant to sec. 102 of the National Environmental Policy Act.

Western Slope Gas Co., 40 IBLA 280, reconsideration denied, 43 IBLA 259 (1979), overruled in pertinent part.

To: Secretary
From: Deputy Solicitor
Subject: The Extent to Which the National Historic Preservation Act Requires Cultural Resources to be Identified and

---

*Not in chronological order.

CONSIDERED IN THE GRANT OF A FEDERAL RIGHT-OF-WAY

I. Introduction and Summary

A recurring issue involved in the grant of a pipeline or other linear right-of-way over federal lands is whether or not the procedures to protect cultural resources in sec. 106 of the National Historic Preservation Act (NHPA), 16 U.S.C. § 470f (1976), apply to non-federal as well as federal lands involved in the project. We have been requested to provide guidance on this question in light of the Interior Board of Land Appeals' recent decision on this subject, *Western Slope Gas Co.*, 40 IBLA 280, *reconsideration denied*, 43 IBLA 259 (1979).

Sec. 106 demands essentially three things of a federal agency considering the grant of a right-of-way: (1) to *identify* properties listed on the National Register or eligible for listing, and which are potentially affected by the undertaking; (2) to *consult* with the Advisory Council on Historic Preservation on the undertaking's potential effects on the identified properties; and (3) to *consider* these cultural resources in planning and implementing the undertaking.

Analysis of this question requires the interpretation of the Advisory Council on Historic Preservation's regulations implementing sec. 106, 36 CFR 800 (published at 44 FR 6068 (Jan. 30, 1979)), which are binding on all federal departments. 16 U.S.C. § 470s (1976). *See also* President's Memorandum on Environmental Quality and Water Resources Management (July 12, 1978). The broad definition these regulations give to the federal "undertaking" and the "area of the undertaking's potential environmental impact" indicates that lands are subject to sec. 106 procedures if they either fall within the area of the undertaking or may be directly or indirectly affected by the undertaking. Such areas include non-federal lands which it is reasonably foreseeable will be affected by the federal undertaking. Decisions of United States courts of appeal which have considered sec. 106 and the similar National Environmental Policy Act (NEPA), 42 U.S.C. § 4332 (1976), are consistent with the regulations' broad definitions of "undertaking" and "area of the undertaking's potential environmental impact."

As explained more fully below, it is therefore my opinion that the agency granting a right-of-way across federal lands must also follow these procedures for non-federal lands involved. This conclusion, which I am asking you to approve as a matter of Departmental policy, means that the decision in *Western Slope* incorrectly limited the scope of sec. 106 to federal lands. Henceforth, upon your approval, the rule to be applied in this Department should be that the federal grant for a pipeline or other linear right-of-way requires the Department to comply with sec. 106 on both the federal and non-federal lands involved in the project, as set forth in this opinion.

Two things should be noted immediately about this conclusion. *First*, these requirements are subject to a rule of reason as to the scope of the lands to be inventoried, and the degree of effort required. These judgments are made by the project manager in consultation with the State Historic Preservation Officer. *Second*, the NHPA is essentially a procedural, action-forcing statute designed to ensure that cultural resources are identified and considered in the decision-making process. It does not provide for a veto or absolute bar to federal undertakings which may adversely affect such resources.

Parts II and III of the opinion set forth my analysis in reaching the above conclusions. Part IV outlines the criteria which determine the extent of the area to be studied, and the various methods for identifying cultural resources, ranging from literature and records searches to field surveys.

II. Scope of Cultural Resources Obligations Pursuant to Sec. 106 of the NHPA

The regulations of the Advisory Council on Historic Preservation, which 16 U.S.C. § 470s (1976) makes binding on all federal agencies, require:

> [E]ach Federal agency to identify or cause to be identified any National Register or eligible property that is located *within the area of the undertaking's potential environmental impact and that may be affected by the undertaking.*

36 CFR 800.4(a) (italics added). This statement defines the area within which the identification and other requirements of sec. 106 must be met. *See id.* 800.4(a),(b).

It is clear that the federal grant of a right-of-way permit for a pipeline or other linear project crossing federal lands fits the definition of an "undertaking":

> "Undertaking" means any Federal, federally assisted or federally licensed action, activity or program or the approval, sanction, assistance or support of any non-federal action, activity, or program.

36 CFR 800.2(c). *Accord*, *Western Slope Gas Co.*, 40 IBLA 280, 287 (1979).

The question then becomes the extent of the area subject to sec. 106 procedures for the undertaking. This area is "the area of the undertaking's potential environmental impact," defined as follows:

> "Area of the undertaking's potential environmental impact" means that geographic area within which *direct and indirect effects generated by the undertaking* could reasonably be expected to occur.

36 CFR 800.2(o) (italics added). Therefore, the "area of the undertaking's potential environmental impact," as defined, determines the extent of lands which must be studied pursuant to sec. 106 for a proposed federal action. *See* BLM Manual 8100.07.

The concept of "direct and indirect effects" is also defined in the Advisory Council regulations, as follows:

> An effect may be direct or indirect. Direct effects are caused by the undertaking and occur at the same time and place. Indirect effects include those caused by the undertaking that are later in time or further removed in distance, but are still reasonably foreseeable.

36 CFR 800.3(a). These effects therefore include all reasonably foreseeable effects caused by the federal undertaking. Non-federal lands are therefore included under this regulation in two circumstances. First, non-federal lands are to be inventoried when construction activities on federal land affect surrounding non-federal land. *Accord*, *Western Slope*, *supra*, 40 IBLA at 287 & n. 2. Second, both kinds of effects logically also include actions which are the reasonably foreseeable consequence of a federal action, such as the construction of non-federal portions of a pipeline or other linear right-of-way. *Accord*, BLM Manual 8100.07(A) ("The Bureau assures that its actions or authorizations take into consideration their effect on cultural resources located on non-federal land").

The regulations thus limit the effects to be studied to those which "could reasonably be expected to occur" as a result of the federal action, *id.* 800.2(o), and thus explicitly adopt a rule of reasonableness, which requires that all reasonably foreseeable effects be studied for potential impact on cultural resources.

The courts have uniformly adopted this interpretation of sec. 106. In cases involving the construction of highways, courts have required agencies to consider the project as a whole, even when certain portions were non-federal. In *Hall County Historical Soc.* v. *Georgia Dept. of Transportation*, 447 F. Supp. 741 (N. D. Ga. 1978), the court held that a state could not avoid compliance with the NHPA by itself funding a portion of a federal-aid highway unless the state turned the whole highway into a purely non-federal project:

> Because to allow defendant [Georgia Dept. of Transportation] to complete construction of that portion of the project known as "the Green Street extension" without the use of federal funds would, in effect, result in a defeat of Congressional intent and of the policies behind the National Historic Preservation Act, the court concludes that unless and until defendant GDOT withdraws all requests for disbursement of further federal funds for the project construction and immediately and forthwith reimburses the federal government for all funds previously disbursed for the project construction, defendant GDOT, its employees, agents, and all others acting in concert with it, are hereby enjoined from construction of that portion of the project known as "the Green Street extension," pending the Federal Highway Administration's compliance with the National Historic Preservation Act.

Id. at 752. Similarly, the court in *Thompson* v. *Fugate*, 347 F. Supp. 120 (E.D. Va. 1972) held that the NHPA applied to an 8.3 mile segment of a 75 mile highway project when the remainder of the project was federally subsidized, even though no federal action had yet been taken on the smaller segment. *But see Western Slope*, *supra*, 43 IBLA at 262.

The highway cases conceivably might be distinguished on the ground that there is slightly more federal involvement in the nonfederal portions of major highways than exists with pipeline rights-of-ways. For example, informal federal participation in highway planning sometime occurs prior to a state's decision to reject federal funds due to a planning controversy. *See*, *e.g.*, *Thompson*, *supra*. The reasoning of the cases is not so limited, however, and instead stands for the broader proposition that all parts of an interconnected project must be considered together. Therefore, they provide a persuasive analogy to the linear right-of-way situation. *See* p. 33, *infra*.

In a non-highway situation, the Fourth Circuit in *Ely* v. *Velde*, 497 F. 2d 252 (4th Cir. 1974) held that a state could not avoid NHPA requirements by the expedient of requesting diversion of Federal funds previously allocated for a prison center to other federal-aid projects. The court reached this result even though the center was independent of the other projects. This is an even stronger case than the cases concerning connected highways, because it shows what kind of indirect federal involvement is sufficient to trigger sec. 106 compliance.

There are, nevertheless, some reasonable limits to the group of activities which can be considered to be direct or indirect effects of a federal undertaking, and so subject to cultural resource identification. For example, in *Weintraub* v. *Rural Electrification Admin.*, 457 F. Supp. 78 (M.D. Pa. 1978), plaintiffs argued the following chain of causality required a federal agency to comply with sec. 106: a private utility had previously received federal low-interest rate loans for general power purposes, which were so profitable to the utility that it had surplus earnings, which it chose to spend in independently constructing a new headquarters building, which needed parking, and which required demolition of an historic building for a parking lot. *Id.* 90–91. The court rejected plaintiffs' contention that the latter demolition was therefore a federal undertaking, noting the causal connection between the federal action and the nonfederal action was more attenuated than it was in *Ely* v. *Velde*, *supra*. The *Weintraub* facts are very different from that of a pipeline or other linear right-of-way which must foreseeably stretch across both federal and non-federal land, and the decision is a good example of when effects are so unforeseeable and remotely connected with an agency's action that they need not be included in a cultural resources survey.

The Board's decision in *Western Slope* determined that the federal grant of a pipeline right-of-way required sec. 106 compliance only on federal lands. Thus, non-federal lands over which connected portions of the pipeline stretched would not require an inventory, though the Board noted the Bureau of Land Management could order such an inventory in its discretion. 40 IBLA at 290. The Board's holding that cultural resource identification is not required plainly conflicts with the broad definition of the "area of the undertaking's potential environmental impact" in the Advisory Council regulations, 36 CFR 800.2(o), as well as the decisions in *Hall County Historical Society*, *supra*, and *Thompson*, *supra*. The federal grant of the right-of-way and the foreseeable construction of other parts of the pipeline on non-federal lands have a close cause and effect relationship in the *Western Slope* type of situation. Construction on non-federal lands would not proceed without the federal grant, and the casual connection between the two can hardly be termed remote and speculative, as it was in *Weintraub*. Therefore, the construction on non-federal lands of a linear right-of-way project is within the area of the federal undertaking's potential environmental impact, and subject to sec. 106.

III. The NEPA Analogy

The preamble to the Advisory Council's regulations implementing sec. 106 states that the Council intended to adopt in 36 CFR 800.2(o) and 800.3 a definition of direct and indirect effect which "is consistent with the definition adopted by the Council on Environmental Quality." 44 FR 6069 (1979). CEQ's definition is found in its NEPA regulations at 40 CFR 1508.8 (published at 43 FR 55978 (1978)), and is identical to the quotation on page 30 *supra*.

NEPA itself provides evidence of Congress' intent in passing sec. 106, and the correct interpretation of the Advisory Council's implementing regulations. For example, Environmental Impact Statements (EIS's) under NEPA are to consider the "environmental impact of the proposed action," 42 U.S.C. 4332(2)(C)(i) (1976), a standard which is closely similar to that in sec. 106 that agencies "take into account the effect of the undertaking on [National Register properties or eligible properties]." Furthermore, NHPA studies are by regulation designed to be integrated as part of the NEPA process, 36 CFR 800.9, further demonstrating the relationship between the two programs.

CEQ's NEPA regulations are even more detailed than the NHPA regulations in describing how non-federal actions are related to federal actions. The section on "effects" requires consideration of all effects in any way "caused" by a federal action, whether directly or indirectly. 40 CFR 1508.8. The section on the scope of an EIS requires agencies to consider the following actions:

> (a) Actions (other than unconnected single actions) which may be:
>
> (1) Connected actions, which means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they:
>
> (i) Automatically trigger other actions which may require environmental impact statements.
>
> (ii) *Cannot or will not proceed unless other actions are taken previously or simultaneously.*
>
> (iii) *Are interdependent parts of a larger action* and depend on the larger action for their justification.
>
> (2) Cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.

40 CFR 1508.25(a) (italics added). *Accord*, *Sierra Club* v. *Hodel*, 544 F.2d 1036 (9th Cir. 1976) (EIS had to include effect of a wholly non-federal aluminum reduction plant when construction of the plant depended on federal construction of a pipeline to serve it and a federal contract to provide power); *National Forest Preservation Group* v. *Butz*, 485 F.2d 408 (9th Cir. 1973); *Sierra Club* v. *Morton*, 400 F. Supp. 610, 644–45 (N.D. Cal. 1975).

The similarity between the provisions of NEPA and sec. 106 make the above quoted provisions of the CEQ regulations an accurate summary of what federal agencies must consider pursuant to sec. 106. In this connection, the Second Circuit in *Watch* v. *Harris*, 603 F.2d 310 (2d Cir. 1979), held that "the mandate of NHPA * * * is quite broad" and that the courts "are no more willing to give a 'crabbed interpretation' to sec. 106 of the Act than the courts have been in respect to NEPA." *Id.* at 326.

IV. Scope of Section 106 Procedures for Rights-of-Ways

A. Extent of Area Studied

Useful guides for determining the geographical scope of the necessary study of rights-of-way impacts are found in cases dealing with the scope of EIS's for federal highways. The three principal criteria are:

(a) the logical termini of the project;

(b) the independent utility of a portion or segment; and

(c) whether the length selected assures adequate consideration of alternatives.

Daly v. *Volpe*, 514 F.2d. 1106, 1109–10 (9th Cir. 1975). These criteria implement a rule of reasonableness, which may allow that less than the whole length be studied in certain circumstances. Such circumstances may be spelled out in counterpart regulations the Bureaus may develop pursuant to 36 CFR 800.11.

The project manager is to implement the rule of reason in choosing the area to be studied, under the criteria of 36 CFR 800, and in consultation with the State Historic Preservation Officer. *See* 36 CFR 800.4(b). The Advisory Council's advice may also be sought in determining the area subject to sec. 106 compliance.

B. Type of Identification Study

Sec. 106 and the Advisory Council's regulation do not require an on-site inspection for cultural resources for every portion of the area affected by the federal undertaking. The identification requirement first calls for a record or literature search to determine if known resources are located within the project's area of environmental impact. 36 CFR 800.4(a)(1). Based on the outcome of this search and the recommendations of the State Historic Preservation Officer, it is up to the agency to determine to what extent, if any, an onsite survey is required. *Id.* (a)(2). In effect, a rule of reason applies.

V. Conclusion

For the reasons explained above, I have concluded that the Board's decision in *Western Slope Gas Co.*, 40 IBLA 280, *reconsideration denied*, 43 IBLA 259 (1979) is inconsistent with the law, and should not govern this Department's actions in the future. Upon your approval, this opinion will have prospective effect only, and will not affect the permit issued to the Western Slope Gas Co., at issue in the *Western Slope* case.

FREDERICK N. FERGUSON
DEPUTY SOLICITOR

APPROVED:

LEO M. KRULITZ
ACTING SECRETARY

UNITED STATES
v.
CLARE WILLIAMSON & LAPINE PUMICE CO.

45 IBLA 264

Decided *February 4, 1980*

Appeal from decision of Administrative Law Judge Robert W. Mesch declaring four placer mining claims invalid for lack of discovery (Contest Nos. Oregon 011735 and Oregon 6115).

Affirmed in part; reversed in part.

1. Mining Claims: Contests—Mining Claims: Lands Subject to—Mining Claims: Location—Mining Claims: Withdrawn Land

A Forest Service special use permit issued to a state agency does not constitute a withdrawal of the land involved from appropriation under the mining law, and a contest will not lie against a subsequently located mining claim on a charge that a portion of the claim is void to the extent that it includes land embraced by the permit.

2. Mining Claims: Discovery: Generally—Mining Claims: Discovery: Marketability

A discovery of valuable minerals under Federal mining laws exists only where the minerals found are of such a character that a person of ordinary prudence would be justified in further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. Discovery requires a showing that the mineral can be presently extracted, removed, and marketed at a profit.

3. Mining Claims: Determination of Validity—Mining Claims: Discovery: Generally—Mining Claims: Withdrawn Land

When land is withdrawn from location under the mining laws subsequent to the to the location of a mining claim, the claim must be supported by discovery at the date of withdrawal to be valid.

4. Mining Claims: Determination of Validity—Mining Claims: Discovery: Generally

If a mining claimant locates a group of claims, he must establish discovery for each claim that he seeks to validate.

5. Administrative Procedure: Burden of Proof—Evidence: Preponderance—Evidence: Prima Facie Case—Mining Claims: Contests—Mining Claims: Determination of Validity

Where the Government contests mining claims on a charge of lack of discovery of a valuable mineral deposit prior to the date when such minerals were no longer subject to location, the claimant, as proponent of the rule, has the ultimate burden of proof as to validity of the claim. The Government, however, must initially present sufficient evidence to establish a prima facie case. The burden then shifts to the claimant to show by a preponderance of credible evidence that a discovery has been made on each claim.

6. Evidence: Generally—Evidence: Burden of Proof—Mining Claims: Contests—Mining Claims: Hearings—Rules of Practice: Evidence—Rules of Practice: Government Contests

In determining the validity of a mining claim in a Government contest, the entire evidentiary record must be considered. If the Government fails to make a sufficient prima facie case against a mining claim, the claimant may move to have the contest dismissed and rest his case. However, when the claimant goes forward with his evidence, the Administrative Law Judge must consider the evidence presented and weigh it in accordance with its probative value. In choosing to rebut the case, the claimant bears the burden of doing so by a preponderance of the evidence and bears the risk of nonpersuasion if he fails.

7. Mining Claims: Discovery: Marketability

Although a favorable showing of actual sales may demonstrate marketability, lack of sales is not necessarily conclusive on the issue of marketability. Lack of sales may be overcome, after all the evidence is heard, by a preponderance of the evidence showing that a prudent person could have extracted and marketed the mineral profitably.

8. Mining Claims: Determination of Validity—Mining Claims: Discovery: Generally—Mining Claims: Mineral Lands

Land is mineral in character when known conditions engender the belief that the land contains mineral of such quantity and quality as to render its extraction profitable and justify expenditures to that end. The charge that the lands embraced by a mining claim are not mineral in character can raise two discrete issues. First, it can challenge the validity of the entire claim. Alternatively, it can be applied to placer claims which are supported by a discovery, with the effect that the claimant must show that each 10 acres of the claim are mineral in character.

9. Mining Claims: Determination of Validity—Mining Claims: Excess Reserves

The charge of invalidity due to the presence of excess reserves admits that the mineral, *qua* mineral, exists within additional claims, but raises the contention that because of the quantity of mineral present in unchallenged claims owned by the mineral claimant, the mineral in the challenged claims would have no market and thus is essentially valueless.

10. Mining Claims: Contests—Rules of Practice: Government Contests—Rules of Practice: Hearings

In a mining contest, a matter not charged in the complaint cannot be used as a ground to invalidate a claim, unless it has been raised at the hearing and the contestee has not objected.

11. Mining Claims: Determination of Validity—Mining Claims: Discovery: Marketability—Mining Claims: Withdrawn Land

A valid mining claim for lands previously withdrawn from location must be supported by discovery as of the date of withdrawal and a showing that marketability has continued since discovery and the minerals can presently be profitably extracted.

APPEARANCES: Edward L. Fitzgibbon, Esq., and James W. Morrell, Esq., Fitzgibbon and Morrell, Portland, Oregon, for appellants; Arno Reifenberg, Esq., Regional Attorney, U.S. Department of Agriculture, Portland, Oregon, for appellee.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

INTERIOR BOARD OF LAND APPEALS

Clare Williamson and the LaPine Pumice Co. appeal from the Mar. 30, 1977, decision of Administrative Law Judge Robert W. Mesch which declared four placer mining claims in Deschutes County, Oregon, invalid for failure to establish timely discovery. The decision followed a hearing in 1976 on two cases, Oregon 011735 and Oregon 6115, which had been consolidated for review.[1]

The four mining claims were originally located for lump pumice by Lloyd Williamson in association with several other persons. The co-locators subsequently conveyed their respective interests in the claims to Williamson, and Clare Williamson inherited her husband's interest upon his death in 1958. She is presently the sole owner of the four claims. LaPine Pumice Co. has a leasehold interest in the claims.

Judge Mesch described the history of these claims at length in his opinion and we include portions of that description here as background for the case.

---

[1] The mining claims are identified in the record and this opinion as Claim Nos. 1–4. Claim No. 2 is at issue in Oregon 011735 and Claim Nos. 1, 3, and 4 are at issue in Oregon 6115. The claims are located within the Deschutes National Forest about 40 miles south of Bend, Oregon, on lands withdrawn from mining location by the Act of Dec. 21, 1945, 59 Stat. 622. Claim Nos. 1, 2, and 3 are contiguous and Claim No. 4 is a short distance to the south. Each claim covers approximately 160 acres.

Oregon 011735 has been pending before the Department since at least June 26, 1963, when a complaint was filed at the request of the Forest Service, challenging the validity of the major portion of Claim No. 2. The Forest Service did not question the validity of the claim as to approximately 17 acres in what has been designated as the east half of Lot 6. The Government's evidence at the 1964 hearing was directed toward showing that the uncontested portion of the claim contains lump pumice in sufficient quantity to satisfy the demand for the mineral from the claim for a reasonable period in the future and the remaining portions of the claim are not valuable for the pumice which they contain because there is no market for it. The mining claimant's evidence was directed toward demonstrating the marketability of the pumice found on the claim and toward refuting the Government's showing of abundant reserves on the uncontested portion of Lot 6. The only issue for determination was whether the contested portions of the claim were invalid under a theory of excess reserves which made the land nonmineral in character.

By a decision dated January 6, 1965, the Hearing Examiner dismissed the complaint upon finding that: (1) the evidence, as well as admissions of the Forest Service, established a discovery of a valuable mineral deposit within the uncontested portion of the claim; (2) lump pumice was found on each subdivision of the claim sufficient to qualify the land as mineral in character; and (3) the Government's argument was not convincing that there is no present or prospective market for the pumice within the contested portions of the claim because of the quantity of pumice within the uncontested portion of the claim.

The Forest Service appealed to the Director, Bureau of Land Management. Among other things, the Forest Service suggested that its original determination that the east half of Lot 6 met the requirements of the mining laws may have been questionable. In a decision of March 31, 1966, the Office of Appeals and Hearings found the evidence unconvincing that there was a discovery of valuable minerals on the claim prior to the time the land was withdrawn from mining location by the Act of December 21, 1945. The lack of evidence on the issue of discovery, it surmised, was possibly due to the failure of the Forest Service to charge lack of discovery on the east half of Lot 6. The Office of Appeals and Hearings concluded that the complaint was erroneously drawn, inasmuch as a correct finding with respect to discovery was indispensable to a proper determination of the validity of the claim. It remanded the case for a hearing on the issue of whether a discovery of valuable minerals was made on the claim prior to the 1945 withdrawal.

The mining claimant appealed to the Secretary of the Interior. She complained, among other things, that the Forest Service had recognized there was a valid discovery on the east half of Lot 6 and the only issue before the Director was whether the Hearing Examiner's decision concerning the mineral character of (or excess reserves in) the contested portions of the claim was supported by substantial evidence. In a decision dated October 23, 1968 (75 I.D. 338), the Assistant Solicitor ruled that the Department was not precluded from inquiring into any question vital to the determination of the validity of a mining claim and the case presented the occasion for the exercise of the Department's plenary authority.

This decision raised a new issue. The Assistant Solicitor commented:

"Contestant's efforts at the hearing were directed to showing that *at that time* the uncontested portion of lot 6 contained such a large tonnage of marketable lump pumice as to make the lump pumice on the contested portions of the claim valueless. Appellant, on the other hand, attempted to deprecate the amount of pumice on the uncontested portion of lot 6 so as to establish the marketability of the pumice on the contested portions of the claim. Neither party attempted to establish the existence or nonexistence of lump pumice in each 10-acre subdivision of the claim *as of December 21, 1945*, in such quantity as would render its extraction profitable and justify expenditures to that end." (p. 345)

The Assistant Solicitor summarized the testimony of a Forest Service mining engineer relating to the excess reserve contention. He noted that the mining engineer's estimates of tonnage were based upon conditions observed at the time of his examinations of the claim between 1961 and 1964 and that practically all of the conditions relied upon were nonexistent in 1945. He concluded that the evidence left wholly unanswered the question as to whether an estimate of the quantity of useable pumice on the claim could have been made upon the basis of evidence discernible in 1945. He noted that the testimony of the Forest Service mining engineer suggested such an estimate could not have been made.

The Assistant Solicitor found that the mining claimant did nothing to supply the want of evidence of a basis for any inference in 1945 of the quantity of useable pumice on the claim. He stated that the testimony of expert witnesses for the mining claimant on the question of the quantity of pumice present on the claim was to the effect that an estimate of the tonnage of commercial lump pumice could not be made even upon the basis of data available [*sic*] at the time of the hearing.

* * * * *

The Assistant Solicitor went on and stated that if the case was decided upon the basis of the claimant's evidence, it would have to be concluded that she failed to demonstrate that the contested land was known to be mineral in character on December 21, 1945, and that there is no validity to her claim to the land. He concluded, however, that while the claimant introduced no evidence bearing upon what he deemed to be the critical issue of the case, neither the case presented by the Forest Service nor the charges of the complaint were calculated to elicit such evidence. He noted that the complaint charged simply that the contested land "is nonmineral in character" without any reference to a point in time as of which the mineral or nonmineral character of the land was to be determined.

The Assistant Solicitor recognized that the Forest Service could properly elect to challenge the validity of the claim as of the time of the hearing rather than the time of the withdrawal. He was unwilling to assume, however, that the Forest Service had made such an election. He stated that there was reason to doubt whether the actions of the Forest Service reflected accurately the facts which the Forest Service proposed to establish and concluded that the record was not a satisfactory basis for determining the validity of the claim. He returned the case to the Bureau of Land Management to notify the Forest Service that it had 60 days to recommend the amendment of the complaint or the filing of a new complaint.

On July 23, 1969, an amended complaint was issued charging that a discovery of a valuable mineral deposit had not been made within the claim by December 21, 1945, and the land within the claim (with the exception of the east half of Lot 6) "is nonmineral in character."

The mining claimant sought a dismissal of the complaint contending that it was not filed within the required 60-day period. By a decision dated May 25, 1970,

> the Bureau's Office of Appeals and Hearings rejected the claimant's contentions and remanded the case for hearing on the amended complaint. This decision was appealed to the Board of Land Appeals. On May 27, 1975, the parties filed a stipulation with the Board requesting an order (1) permitting Clare Williamson to withdraw her appeal from the Bureau's decision issued five years previously, (2) reinstating the order of the May 25, 1970 decision remanding the case for further hearing, and (3) consolidating the case with Oregon 6115. By an order of January 22, 1976, the Board granted the requests in the stipulation.
>
> Oregon 6115 was initiated on April 13, 1970, with the filing of a complaint charging that Claims 1, 3 and 4 were invalid because they had not been perfected by a discovery of a valuable mineral deposit prior to December 21, 1945, and the land within the claims "is nonmineral in character." This case was held in abeyance pending the outcome of the appeal from the May 25, 1970 decision of the Bureau.

(Dec. 2–6).

At the 1976 hearing, the Forest Service presented one witness, Milvoy Suchy, a Forest Service mining engineer, who had also testified at the 1964 hearing. He repeated some of his earlier testimony in condensed form as to Claim No. 2,[2] and extended his estimates and conclusions concerning the overabundant amount of lump pumice to include Claim No. 1 and the north half of Claim No. 3. He further testified that he had not been able to find sufficient exposures of lump pumice to make any estimate or reach any conclusion concerning the existence of lump pumice on the south half of Claim No. 3 and all of Claim No. 4. As at the 1964 hearing, Suchy's testimony was based upon his experience as a mining engineer, his personal observation of the conditions on the four claims, and information obtained at the time of his examination of the claims on nine or ten occasions from 1961 to 1973.

The appellants presented three witnesses who also had testified in 1964: Clare Williamson, the mining claimant; Donald T. Fahey, a general building contractor who had worked for the Williamsons; and James Miller, a market analyst and, by 1976, one of the owners of LaPine Pumice Co. Through these three witnesses, appellants reconstructed the history of activities on the four claims and presented the findings and plans of Lloyd Williamson with respect to the claims. In addition, appellants elicited discussion of the nature and quality of the pumice on the Williamson claims and the use and general marketability of that pumice.

For the purpose of this appeal, it is necessary to examine the specific charges made by the Forest Service. In the amended complaint for Oregon 011735, the Forest Service charged that:

---

[2] The parties agreed that relevant portions of the 1964 hearing transcript would be incorporated into the record of the case. They also agreed that material presented with respect to Claim No. 2 at the earlier hearing which was pertinent to the other claims could be considered in connection with all four claims. Citations to the 1964 transcript in this opinion will read 1 Tr. —, and to the 1976 transcript, 2 Tr. —.

> A. A discovery of a valuable mineral deposit had not been made within the unnamed placer claim by December 21, 1945.
>
> B. The portion of the claim made up of lots 3, 4, 5, 7, and the west half of lot 6 is nonmineral in character.
>
> C. As to the following portion of the east half of lot 6:
>
> "Commencing at the quarter corner between Section 36, Township 21 South, Range 12 East, and Section 31, township 21 South, Range 13 East, W.M., thence North 34°15′ East a distance of 3744 feet to stake No. 1, the point of beginning; thence South 64° East a distance of 125 feet to Stake No. 2; thence North 26° East a distance of 125 feet to stake No. 3; thence North 64° West a distance of 125 feet to stake No. 4; thence South 26° West a distance of 125 feet to stake No. 1, the point of beginning." At the time the mining claim was located, the above-described portion of the east half of Lot 6 was not open for the location of a mining claim since it had been appropriated to another use by the issuance of a special-used permit to the Oregon State Game Commission dated December 6, 1932, which permit is still in effect.

In Oregon 6115, the complaint charged that:

> A. Minerals had not been found within the limits of the claims in sufficient quantities to constitute a valid discovery prior to December 21, 1945.
>
> B. No discovery of a valuable mineral had been made within the limits of the claims by December 21, 1945, because it had not been shown by that time that the materials could be marketed at a profit or that there existed a market for these materials.
>
> C. The land within the claims is nonmineral in character.

The complaints raise two principal issues: whether there was a discovery on each claim by Dec. 21, 1945, and whether certain portions of Claim No. 2 and Claim Nos. 1, 3, and 4 are nonmineral in character. We shall address these issues in the order suggested by the complaints since a claim of mineral character may be supported by geological inferences arising out of discovery. *United States* v. *Bunkowski*, 5 IBLA 102, 79 I.D. 43 (1972) *appeal pending Bunkowski* v. *Applegate*, Civ. No. R–76–182–BRT, (D. Nev. filed Sept. 22, 1976).

[1] Before examining these issues, however, we wish to address a question which neither side has pursued in this appeal. Charge C of the complaint filed in Oregon 011735 alleged that a portion of the east half of Lot 6 was not open to location at the time Claim No. 2 was initiated, because of a prior grant of a special use permit by the Forest Service to the Oregon State Game Commission. This charge is invalid, and should have been dismissed.

Effectively, this charge is premised upon a belief that the Forest Service could, through issuance of a special use permit, withdraw the land. There is no support for such a proposition.

The Secretary of Agriculture, as a general matter, is neither expressly nor impliedly authorized to withdraw unimproved national forest lands from mineral location. *See generally United States* v. *Foresyth*, 15 IBLA 43, 49–54 (1974); *United States* v. *Bergdal*, 74 I.D. 245, 249–52 (1967); *United States* v. *Crocker*, 60 I.D. 285 (1949). Indeed, Exec. Order No.

10355 expressly delegated both the inherent authority of the President to withdraw land, and the authority conferred upon him by the Pickett Act, 36 Stat. 847, 43 U.S.C. § 141 (1970), to the Secretary of the Interior. Included with this was the authority to withdraw land under the administrative jurisdiction of any executive department, with the concurrence of the head of that agency. *See* Sec. 1(c), Exec. Order No. 10355, 17 FR 4831 (May 26, 1952). Without the formal action of the Secretary of the Interior, however, no agency could withdraw the land which it administered. Thus, mere issuance of a special use permit could not operate to withdraw the land from mining or mineral location. *A. W. Schunk*, 16 IBLA 191, 81 I.D. 401 (1974). *See also United States* v. *McClarty*, 17 IBLA 20, 81 I.D. 472 (1974).[3]

At the hearing the parties stipulated to the correctness of this charge (2 Tr. 4). But on review of an appeal this Board has full powers of de novo review. *Exxon Co., U.S.A.*, 15 IBLA 345 (1974). Moreover, as this Board has recognized, parties may not stipulate to an erroneous theory of law. *United States* v. *Ideal Cement Co.*, 5 IBLA 235, 79 I.D. 117 (1972), *aff'd sub nom. Ideal Basic Industries* v. *Morton*, 542 F.2d 1364 (9th Cir. 1976). Accordingly, we hereby dismiss Charge C of the complaint and vacate the stipulation erroneously entered into by the parties.[4]

[2, 3, 4] It is well established that a mining claimant must discover a valuable mineral deposit before he may receive title to a mining claim located on public land. A discovery of valuable minerals under Federal mining laws exists only where the minerals found are of such a character that a person of ordinary prudence would be justified in further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. *United States* v. *Coleman*, 390 U.S. 599 (1968); *Chrisman* v. *Miller*, 197 U.S. 313 (1905); *Castle* v. *Womble*, 19 L.D. 455, 457 (1894). This "prudent man test" has been refined to require a showing of marketability;

---

[3] The opinion of Judge Fishman correctly notes that where Congress has expressly so provided, the Department of Agriculture can withdrawn land from mineral entry. *Schaub* v. *United States*, 207 F.2d 325 (9th Cir. 1953); *see also Rawson* v. *United States*, 225 F.2d 855 (9th Cir. 1955). It seems axiomatic that Congress can vest the authority to dispose or limit public access to Federal land in any manner which it deems fit. The discussion in the text, however, is directed to the question whether absent specific statutory authority, the Department of Agriculture is authorized to withdraw from mineral location. The answer is clearly in the negative.

The fact that the Forest Service Manual purports to confirm such authority upon the Forest Service is of no consequence. Administrative manuals adopted by agencies of the Federal Government do not have the force and effect of law. *See Morton* v. *Ruiz*, 415 U.S. 199, 235 (1974). Moreover, it is mere bootstrapping to contend that an agency may delegate to itself powers which it would not have in the absence of the delegation.

[4] The discussion in the text is directed solely to the question whether the issuance of the special use permit had the effect of withdrawing the land from mineral location. We do not here decide to what extent, if any, a patent issued for the land would be subject to the permitted use.

that is, a showing that the mineral in question can be presently extracted, removed, and marketed at a profit. *United States* v. *Coleman*, *supra.* In circumstances, such as the present case, where the land is closed to location under the mining laws subsequent to the location of the mining claim, the claim must be supported by discovery at the time of the withdrawal. *Cameron* v. *United States*, 252 U.S. 450 (1920); *Clear Gravel Enterprises* v. *Keil*, 505 F.2d 180 (9th Cir. 1974); *United States* v. *Henry*, 10 IBLA 195 (1973); *United States* v. *Gunsight Mining Co.*, 5 IBLA 62 (1972); *United States* v. *Isbell Construction Co.*, 4 IBLA 205, 78 I.D. 385 (1971). Furthermore, if a mining claimant locates a group of claims, he must establish discovery for each claim that he seeks to validate. *United States* v. *Melluzzo* (*Supp. on Judicial Remand*), 32 IBLA 46 (1977); *United States* v. *Bunkowski*, *supra* at 120–21, 79 I.D. at 51–52.

[5] When the Government contests the validity of a mining claim, the ultimate burden of proof as to the validity of the claim is upon the mining claimant. The Government, however, bears the initial burden of going forward with sufficient evidence to establish a prima facie case that no valuable mineral discovery has been made. *Foster* v. *Seaton*, 271 F.2d 836 (D.C. Cir. 1959); *United States* v. *Bechthold*, 25 IBLA 77 (1976); *United States* v. *Taylor*, 19 IBLA 9, 82 I.D. 68 (1975). The Board has stated that prima facie means that the case is adequate to support the Government's contest of the claim and that no further proof is needed to nullify the claim. The Government does not have to negate the evidence presented by the mining claimant. *United States* v. *Bunkowski*, *supra* at 119, 79 I.D. at 51. If the Government shows that one essential criterion of the test was not met, it has established a prima facie case. *United States* v. *Taylor*, *supra* at 28, 82 I.D. at 75.

Once the Government has established a prima facie case that the claim is not supported by discovery, the burden of going forward then shifts to the contestee to overcome the Government's showing. *Humboldt Placer Mining Co.* v. *Secretary of the Interior*, 549 F.2d 622 (9th Cir.), *cert. denied*, 434 U.S. 836 (1977); *United States* v. *Springer*, 491 F.2d 239 (9th Cir.), *cert. denied*, 419 U.S. 834 (1974); *Foster* v. *Seaton*, *supra; United States* v. *Harris*, 38 IBLA 137 (1978); *United States* v. *Bechthold*, *supra.*

[6] In determining the validity of a mining claim in a Government contest, the entire evidentiary record must be considered. If the Government fails to make a sufficient prima facie case against a mining claim, the claimant may move to have the contest dismissed and rest his case. However, when that claimant goes

forward with his evidence, the Administrative Law Judge must consider the evidence presented and weigh it in accordance with its probative value. In choosing to rebut the case, the claimant still bears the burden of doing so by a preponderance of the evidence and bears the risk of nonpersuasion if he fails. *Foster* v. *Seaton, supra; United States* v. *Bechthold, supra; United States* v. *Taylor, supra.*

In spite of the Assistant Solicitor's clear directive in his 1968 opinion to address the mineral character of Claim No. 2 as of Dec. 21, 1945, and the Forest Service's complaints charging lack of discovery on all claims as of that date, the Forest Service did not present at the 1976 hearing any new evidence of conditions on the claims as of Dec. 21, 1945, which constitutes a prima facie case against each claim. Rather, Milvoy Suchy testified as to the conditions of the claims when he surveyed them. He was not asked to give an opinion as to whether the mineral values on the claims were such as would prompt a prudent man to believe in 1945 that the minerals could be extracted and marketed at a profit. *See United States* v. *Knecht*, 39 IBLA 8 (1979); *United States* v. *Bechthold, supra; United States* v. *Blomquist*, 7 IBLA 351 (1972).

Judge Mesch cited the ruling in *United States* v. *Zweifel*, 508 F.2d 1150 (10th Cir. 1975): "If mining claimants have held claims for several years and have attempted little or no development or operations, a presumption is raised that the claimants have failed to discover valuable mineral deposits or that the market value of discovered minerals was not sufficient to justify the costs of extraction." 508 F.2d at 1156, n.5. He asserted that "a prima facie case was made by the evidence showing the production and sale of only 25 or 30 tons of pumice between 1940 and 1945."

We find this to be a weak prima facie case. This evidence appeared initially as Contestant's Exhibit No. 2 at the 1964 hearing and no opinion was sought by the Government from witness Suchy as to the effect of those facts on the issue of discovery. While Judge Mesch could properly apply the law to these facts, we note that on the face of the documentary evidence, the notation "1942–1945 (Did not operate, Mr. Williamson in war job)" explains the temporary lapse in sales and rebuts the presumption stated in the *Zweifel* rule.

Judge Mesch stated that the test to be applied in this case, as defined by the Assistant Solicitor in his 1968 decision, is "whether, on the critical date * * *, known conditions were such as reasonably to engender the belief that the land contained mineral of such quality and quantity as to render its extraction profitable and justify expenditures to that end." He noted that neither party at the 1976 hearing attempted to supply evidence as to whether an estimate of the quantity of useable pumice on the claims could have been made upon the basis of evidence discernible in 1945. He found that the positions taken by the Forest Service at the 1976 hearing [5]

> constitute a recognition or admission that there is no question of quantity or quality and that the only matter for decision is whether, as of the critical date, the lump pumice found on the claims could have been extracted and marketed at a sufficient profit to justify a person of ordinary prudence in spending his time and money mining the pumice. In other words, could sufficient pumice have been marketed at a sufficient profit to justify its exploitation. Under the positions taken by the Forest Service, quantity becomes an issue only if a finding is made that there was a timely discovery.

(Dec. 8–9).

Judge Mesch began his analysis of the evidence as to marketability by examining the production and sales tabulations for the claims during the period 1940–1963. The parties stipulated to these figures at both hearings. He noted that the Forest Service agreed that the production reflected in the tabulations was extracted at a profit but indicated that the record did not show the amount of profit and it was impossible to ascertain the amount from the evidence. Accepting the sales figures as total net profit, he then averaged the values during three periods of time and derived average yearly sales figures of $175 per year from 1940–1945, $1,866.66 per year from 1946–1948, and $1,368.45 per year from 1949–1961. On the basis of these computations he held that it would be "hard to believe that a person of ordinary prudence would have been willing as of Dec. 21, 1945, to invest his time and money to develop the pumice on Claim No. 2 (from which 95 percent of the production came) or to develop any of the other three claims" (Dec. 9–10).

Judge Mesch concluded his analysis of the marketability of the lump pumice in these claims as follows:

> I recognize that evidence of sales or the successful exploitation of a mining claim is not necessary to satisfy the prudent man test. However, with the exception of the evidence showing the production of 25 or 30 tons of pumice in 1940–1941, the general admission by the Forest Service that it was produced at an unknown profit, the implied recognition by the Forest Service that the pumice was of a quality that would have met the market demand, and the fact that there was some market in the United States of an undisclosed extent for pumice, there is nothing in the record showing the conditions that existed as of December 21, 1945, which would have engendered the belief that a sufficient amount of pumice could have been sold at a sufficient profit

---

[5] The positions of the Forest Service as summarized by Judge Mesch are:

"(1) all of the claims are invalid because they had not been perfected by the discovery of a valuable mineral deposit as of Dec. 21, 1945, and (2) if there was a discovery, it would only validate the east half of Lot 6 of Claim No. 2 because (a) the remaining portions of that claim, all of Claim No. 1, and the north half of Claim No. 3 would be invalid under the theory of excess reserves as of Dec. 21, 1945, and (b) the south half of Claim No. 3 and all of Claim No. 4 would be invalid because the lands were nonmineral in character from the standpoint of the quantity or nonexistence of lump pumice as of Dec. 21, 1945."
(Dec. 6–7). He also notes that contestees were in apparent agreement with these issues.

> to attract the efforts of a person of ordinary prudence in extracting and marketing the pumice from the claims.
>
> Without some evidence as of December 21, 1945, relating to (1) the costs of extracting the pumice from the claims, (2) the costs of sorting, bagging, or other processing of the pumice, (3) the costs of transportation, (4) the costs of marketing, (5) the sale prices of pumice for various uses, and (6) the amount of pumice from the claims that might reasonably be expected to enter the market, no one could conclude that a prudent person would have been justified in spending his time and money extracting the pumice from any of the contested claims as of December 21, 1945.

(Dec. 11–12).

Judge Mesch is correct that there is no evidence in the record providing actual production costs and market prices for lump pumice as of Dec. 21, 1945. Appellants assert that Judge Mesch erred in nullifying the claims on this basis. In the context of this case, we agree.[6]

[7] As already stated, the test for discovery is whether conditions are such that a prudent person would be willing to invest time and money in developing a mining claim. Where a withdrawal of the land from mineral location is involved, a claimant must show that such conditions were extant at the time of the withdrawal. In this case, the marketability test requires evidence that the claimed mineral was marketable as of 1945. Location based on speculation that there may be a market in the future for the mineral does not establish discovery. *Barrows* v. *Hickel*, 447 F.2d 80, 83 (9th Cir. 1971).

While reference to sales and receipts for a period of years is certainly relevant to the determination of the existence of a discovery, it cannot be solely determinative of a claim's validity, particularly where, as here, the question concerns the size of a profit and not whether any profitable mining could occur at all.

It is well established that, although a favorable showing of actual sales may demonstrate marketability, lack of such sales is not conclusive on the issue of marketability. Lack of sales may be overcome, after all the evidence is adduced, by a preponderance of the evidence showing that a prudent individual had a reasonable expectation of his or her ability to extract and market the mineral profitably. *See Verrue* v. *United States*, 457 F.2d 1202 (9th Cir. 1972); *Barrows* v. *Hickel*, *supra* at 82; *United States* v. *Gibbs*, 13 IBLA 382, 391 (1973); *United States* v. *Harenberg*, 9 IBLA 77 (1973).

Inasmuch as evidence indicating a total lack of sales and production may be overcome by relevant evidence, *a fortiori*, the existence of sales which may be deemed to be insufficient cannot be deemed to conclusively establish the invalidity of a claim.

---

[6] We also wish to note that the Board does not necessarily concur with Judge Mesch's view that a profit of either $1,866 per year or $1,368 per year would not justify a person of ordinary prudence in the expenditure of funds. First, it must be remembered that the claims were subject to mining, due to their topographic situation, for only a small part of the year. (*See, e.g.*, 1 Tr. 213, 259–60, 262). Moreover, a profit of $1,866 in 1946–48 would represent a considerably greater amount of money than it would today. In light of our disposition of this appeal, however, it is unnecessary to determine if such profit, in and of itself, was sufficient to establish the validity of Claim No. 2.

There may be a number of reasons why any individual claimant might decide to limit production from a claim. Herein, appellants testified that production had purposefully been held to minimum levels in order to avoid heavy investment in an unpatented mining claim (2 Tr. 70–71). This is, of course, a common problem with mining claims, since both individuals and lending institutions are often reluctant to invest great funds in a mining venture in the absence of a patented mining claim. Moreover, the testimony elicited at the hearings gives independent support to appellants' allegations.

The Forest Service stipulated to the profitable sale of lump pumice extracted from Claim No. 2 in 1941. Therefore, it was unnecessary for appellants to produce evidence of profitability by actual cost and market price statistics for that sale. It is clear from the record that after this initial marketing of material from the claim, production was temporarily stopped from 1942–1945 because of World War II.[7] The court in *Charlestone Stone Products Co., Inc.* v. *Andrus*, 553 F.2d 1209 (9th Cir. 1977), *rev'd in part on other grounds* 436 U.S. 604 (1978), described a similar situation as follows:

> The seemingly sporadic operations by Southern and Brawner were a mirror of the building and construction industry in the Las Vegas area during and shortly after World War II. Continuous operation of a placer mining claim is not a per se requisite to proving the validity of that claim. Cessation of operation of any economic enterprise may be caused by innumerable factors totally beyond the bona fide intentions of the operator. Reason dictates that periodic cessation of operation of a placer mining claim, short of an intentional abandonment of the claim, need not defeat ultimate proof of validity.
>
> Since a total absence of operation does not preclude a finding of validity (*Verrue, supra*), it follows that sporadic operation does not preclude a finding for validity.

553 F.2d at 1214–15.

In the present case, there was no abandonment. In fact, Lloyd Williamson and his associates relocated Claim Nos. 1 and 2 during the period of no production to eliminate original locators who were not doing any work on the claims (2 Tr. 67). Previously, they had defended Claim No. 2 against other locators (2 Tr. 74–77; Contestees' Exhibit I,

---

[7] At both hearings, evidence was produced concerning Lloyd Williamson's activities during World War II. In their statement of reasons appealing Judge Mesch's decision, appellants argue additional facts related to the impact of World War II on their mining activities. The Board has not considered this latter information as part of the record of this case. It is well established that the Board will consider evidence tendered for the first time on appeal only for the limited purpose of determining whether a further hearing is needed. Furthermore, the Board will receive such evidence for that limited purpose only when there is a clear and convincing reason why the evidence was not submitted at the original hearing. *United States* v. *Maley*, 29 IBLA 201 (1977); *United States* v. *MacIver*, 20 IBLA 352 (1975); *United States* v. *McKenzie*, 20 IBLA 38 (1975).

(Continued)

1976 hearing). We know from Clare Williamson's testimony as well as Forest Service evidence that Lloyd Williamson worked in a "war job" from 1942–1945 and as a direct result the claims could not be mined (2 Tr. 164; Contestant's Exhibit No. 2, 1964 hearing). It is also clear from the record that Lloyd Williamson had well-thought-out development plans for the claims which were interrupted by World War II (2 Tr. 65–66, 157–59).

Clare Williamson was questioned about their lump pumice business during the 1942–1945 period of nonproduction.

> Q Now, during the years 1944 and in 1945, as well, we were embroiled in the Second World War. I would assume that there was very little mining operation going on up in that area during that period, is that correct?
>
> A [Clare Williamson] Oh, yes, of course.
>
> Q So, would it be fair to say that you were more or less examining or investigating your possible markets during that year?
>
> A Well, that's true, yes; yes, that's true.

(2 Tr. 157). Since the Williamsons could not actually mine and market the lump pumice on their claims, they clearly did the next best thing, maintain contact with and further develop their market. Williamson testified that she and her husband made numerous inquiries to prospective customers of lump pumice. They received positive responses and requests for samples which they provided. They received unsolicited inquiries as well (2 Tr. 155–57). We conclude that these activities evidence the reasonable response of a prudent person who has a marketable claim but is faced with circumstances beyond his control.

There is additional evidence that suggests that the Williamson lump pumice could have been successfully mined. At the 1964 hearing, appellants introduced a letter dated Aug. 14, 1963, and addressed to Clare Williamson from the president of Charles L'Hommedieu and Sons Co. in Chicago, Illinois, one of her customers (Exhibit 0). The letter reads:

> Lump Pumice Stone was being used to clean and dress polishing and grinding wheels and buffs when I entered this business in 1925. In fact, our records show it was in common use for this purpose when Chas. F. L'Hommedieu & Sons Co. started business in 1898.
>
> In recent years it is also being used to clean grease and residue from abrasive belts and it is our opinion that the demand for this material will continue for many years to come.
>
> At one time Italian Lump Pumice Stone was also used, but this material was harder and heavier than the domestic grade and did not do the cleaning job nearly as well as the Lump Pumice Stone you have been supplying us for many years.
>
> We have had numerous requests from the United States Government for lump pumice stone cut in blocks 4" x 4" x 8" long, which is used for cleaning kitchen grills. Should you ever be in a position to furnish it in this shape, we are certain you would substantially increase your market.

The letter establishes that a general market for lump pumice existed as early as 1898. Contestant's Exhibit 16 (1964 hearing), an article on pumice from the Bureau of Mines Minerals Facts and Problems states that "[p]robably the earliest record of domestic pumice production for abrasive purposes was in 1883."

At least two major reports had been prepared prior to 1945 describing the geological character of the Newberry Crater area of eastern Oregon which includes the Williamson claims. The earliest published report in 1935 was prepared by Howell Williams and entitled "Newberry Volcano of Central Oregon." The second, entitled "Nonmetallic Mineral Resources of Eastern Oregon," was written by Bernard N. Moore and published in 1937. Both reports were introduced by Appellants at the 1976 hearing (Exhibit G) and the Williams report was placed in evidence by the Forest Service at the 1964 hearing (Exhibit 1). The significance of the reports is pinpointed by the testimony of Mr. Miller:

> Q I understand. Do you have tabbed the edges of the divider—"Williams, 1935; Moore, 1937; Higgins, 1967; Higgins, 1969; Photos and Maps; History of Claims; and Claim Contest 40 and 41". To what does "Williams, 1935" refer?
>
> A [Mr. Miller] "Williams" refers to the Newberry Volcano of Central Oregon, and he's considered one of the basic underlying reports on that area.
>
> Q The Moore report is referred to up here. Williams first—now we referred to the "Moore, 1937". Is this a publication by Mr. Moore covering this particular area and the pumice development in tha area?
>
> A This area was included as a majo portion of this—of the pumice section o this report, yes.
>
> Q Do these reports touch upon the economic feasibility of mining pumice a well as the geological existence of th deposits?
>
> A This is the reason for the inclusio of this report. It's the one that went int this—delved into this more than any o the rest of them. The others really jus touched upon it. They were more or les in the geology. This report goes into th economics of it.
>
> * * * * *
>
> Q * * * [Were the reports] include in your prepared exhibit to show the conclusions of these writers as to the formation of these pumice deposits, as well a their commercial value and the extent o their existence?
>
> A I put them in primarily to show tha the claims were staked in conformit with existing known pumice occurrences Point 1—they show also that there wa every reason to believe there were different types of pumices up there, and i wouldn't be all one mass deposit of similar type pumice; and it was a commercial type.
>
> Q You have included here Howell Williams' map, which is a reprint, I tak it?
>
> A I blew this up because I think whe you read the normal Howell William report, it escapes the average reader tha these pumice cones—the one that we hav on Claim 4 in the central pumice cone and the one that was not staked—the on that's in the north—and no longer stakeable—are completely rhyolite pumic cones in their entirety and what yo would expect to find in one portion o you would expect to find in the others and the better section of that is this cross-section which is shown here, and I'v colored, again with their code, whic shows the central pumice cone as bein the main one, and it shows that the obsidian flow that came out one side of it—

> it shows where it is and if you look at the staking pattern on this thing, you'll see that these gentlemen must have staked these claims in line with Moore's report and made no attempt to stake areas that didn't involve pumice. They left out the obsidian flow and anything in relation thereto.

(2 Tr. 136–39).

These reports establish that prior to 1945 the existence of significant pumice deposits in the area of the Williamson claims was known. The testimony of Miller with respect to the staking of the Williamson claims and that of both Williamson and Fahey with respect to Lloyd Williamson's familiarity with the reports (2 Tr. 67, 155) indicates that anyone desiring to mine and market lump pumice did have access to information describing the mining and marketing of lump pumice in Oregon prior to 1945. The Moore report which particularly focuses on the quality, use, and market for lump pumice found in eastern Oregon includes a section entitled "Economic Aspects of the Pumice," containing the following statement: "*Lump pumice of possible commercial interest* covers an area of about 3,500 square miles east of the summit of the Cascade Range. There are three different types, which are represented by the older and younger sheets of Crater Lake and *the pumice of. Newberry Crater*" (p. 171, italics added). Moore concludes his report with a section on "Development" in which he describes some successful efforts at marketing lump pumice, including one "at considerable profit." He further notes that "[t]he pumice deposits of eastern Oregon are practically undeveloped, probably because of very recent availability of suitable railroad transportation" (pp. 174–75). The inference drawn is that the pumice was suitable for development.

We conclude that the Moore report would have certainly prompted an interested person to explore the Newberry Crater Region and, having located an appropriate claim, investigated the market, and profitably sold from the claim, to reasonably believe that he could profitably develop a lump pumice business. The testimony of Suchy and Miller as well as the Williams and Moore reports show that the lump pumice in the claims is good quality pumice and that the claims contain more than one type of lump pumice, making them adaptable to a variety of commercial uses. The profitable marketing of material from Claim No. 2 in 1941 represents a bona fide beginning to developing a workable mine and inquiry in the following years disclosed further evidence of a continuing market.

Nonmineral in Character

At the beginning of the 1976 hearing, Judge Mesch and Mr. Reifenberg, counsel for the Forest Service, agreed, without comment from Mr. Morrell, counsel for appellants, that there are really two issues encompassed by the Forest

Service charge that portions of Claim No. 2 and all of Claim Nos. 1, 3, and 4 are nonmineral in character (2 Tr. 5–6). They assert that the lands embraced by the S ½ of Claim No. 3 and all of Claim No. 4 are nonmineral in the sense that they are not mineral in character because of an insufficient quantity of lump pumice to justify consideration as a valuable mineral deposit and also that, assuming the validity of some of the claims, certain lands are nonmineral because of excess reserves which make the lump pumice unmarketable.

[8] Mineral in character and excess reserves can be seen as differing facets of a single concept. Land is mineral in character when known conditions engender the belief that the land contains mineral of such quantity and quality as to render its extraction profitable and justify expenditures to that end. *United States* v. *Meyers*, 17 IBLA 313 (1974); *United States* v. *McCall*, 7 IBLA 21, 79 I.D. 457 (1972). The charge that the lands embraced by a mining claim are not mineral in character can raise two discrete issues. First, it can challenge the validity of the entire claim. As such, it is the normal adjunct to a charge of no discovery. Alternatively, it can be applied to placer claims which are supported by a discovery, with the effect that the claimant must show that each 10 acres of the claim are mineral in character. *Id.* Thus, to the extent that a placer claim embraces 10-acre subdivisions which do not have the located mineral present, those portions which are nonmineral will be declared null and void.

[9] Questions relating to excess reserves, though they are interrelated to a determination of the mineral character of land, arise in a different context. The charge of invalidity due to the presence of excess reserves *admits* that the mineral, *qua* mineral, exists within additional claims, but raises the contention that because of the quantity of mineral in other claims owned by a mining claimant, the mineral in certain claims would have no market and thus is essentially valueless.

The value of all minerals, with the possible exception of intrinsically valuable minerals such as gold and silver, is directly related to the market for the minerals. Thus, if we assume that the market for a mineral is 1,000 tons a year, an individual with a supply of 10,000 tons would be capable of fulfilling market requirements for the next 10 years. In the first year, the value of an initial 1,000 tons is the market value. The value of the subsequent tonnage, however, is discounted owing to the inability to market it immediately. This is not to say that the remaining 9,000 tons is valueless. Rather, each ton's relative present value declines depending upon how long it is necessary to wait until it can be marketed. If, however, we assume that the mining entity has a total supply of 1,000,000 tons of mineral, but that the market will still only absorb 1,000 tons a year, it will be seen that a vast amount of the tonnage effectively has no present value. If we assume a static market demand, it will take 1,000 years to market the entire mineral supply. The present value of earnings a millenium in the future can safely be viewed as zero.

This is the problem with which the concept of excess reserves deals. If an individual has an admittedly valid mining claim which itself contains reserves sufficient to meet the reasonable market demand, giving due consideration to foreseeable expansion and contraction thereof, for a period in excess of 50 years, additional deposits of the same mineral, located by the same individual, effectively have little or no *present* value. Since present value is the benchmark of the marketability test, such additional claims are not valid. *United States* v. *Baker*, 23 IBLA 319 (1976); *United States* v. *Bunkowski*, *supra;* *United States* v. *Anderson*, 74 I.D. 292 (1967).

Review of the 1976 hearing transcript suggests that the Forest Service did concede that the mineral existed on Claims Nos. 1, 2, and 3. With respect to Claim No. 2 it is clear that it did not wish to challenge existence of the mineral but rather was claiming that there were excess reserves within the claim's boundary. Prior to presenting the contestees' witness, Mr. Morrell moved to strike the charge as to nonmineral character of portions of Claim No. 2:

MR. MORRELL: All right. Now, likewise, with regard to 011735, Paragraph V, Subdivision (b), the Contestees do move the Court to strike from the complaint, that charge that a portion of the claim made up of Lots 3, 4, 5, 7 and the west half of Lot 6 is non-mineral in character, be stricken. Now, that is referring—those lots are lot numbers referring only to Claim No. 2 and we feel that there has been no evidence at all introduced here to support that charge.

JUDGE MESCH: Mr. Reifenberg?

MR. REIFENBERG: If it is still understood that our reserve question remains in the case, then I would have no objection to the move.

JUDGE MESCH: Let me say this, Mr. Morrell: I have to write a written decision in the case, after I have studied all of the evidence. I had intended simply to pretty much ignore the issues—the charges as stated in the two complaints, and simply point out in my decision what the issues were to be decided in this case. One of them would be the—whether the south half of Claim No. 3 and all of Claim No. 4 is non-mineral in character from the standpoint of the absence of any showing of quantity within the lands. Now, that is stated very roughly, but I would pose that as an issue. So with that, if you want to proceed further with the charges in the complaint, it's all right. I just wanted to mention what my thinking was.

MR. MORRELL: Well, we felt that the charge in the complaint that it is non-mineral in character not only was not proved, but that the contrary was proved by the witness, Suchy, that Lots 3, 4, 5, 7, and the west half of Lot 6 were all mineral in character, generally; and I don't know what

> that means, but I—everybody seems to have a different idea of what that means, but it is something that my—I believe they had the burden of proving that and I don't think they have made the grade, and for that reason, I do not want to overlook making my record.
>
> **JUDGE MESCH:** Very well. Disregarding the question of excess reserves, I would agree with you.
>
> **MR. MORRELL:** All right.
>
> **JUDGE MESCH:** At least today, I don't know what there is in the previous hearing, but at least today, there has been no evidence presented that the lands described in Charge V(b) are non-mineral in character. But at the beginning of the proceeding, Mr. Reifenberg, in effect, indicated he wasn't making that allegation, other than from the standpoint of excess reserves.

(2 Tr. 41–43).

[10] A charge that lands are nonmineral in character does not necessarily give rise to a claim that there are excess reserves, since it is normally premised on a total lack of mineralization, as indeed, the Government contends exists on the S ½ of Claim 3 and all of Claim 4. In a mining contest a matter not charged in the complaint cannot be used as a ground to invalidate a claim, unless it has been raised at the hearing and the contestee has not objected. *United States* v. *McElwaine*, 26 IBLA 20 (1976); *United States* v. *Northwest Mine & Milling, Inc.*, 11 IBLA 271 (1973); *United States* v. *Pierce*, 3 IBLA 29 (1971). The excess reserve issue in this case was raised in the Forest Service statement of issues submitted to Judge Mesch prior to the hearing. Appellants received a copy of the statement and therefore they had notice of the issue. Since they made no objection at the hearing, we conclude that they have not been prejudiced by the failure to specifically charge in the complaint that there were excess reserves within the claims. *United States* v. *Northwest Mine & Milling, Inc.*, *supra.*

While it is clear from the record that there was lump pumice on Claim No. 2 sufficient to warrant a prudent man to expect that he could profitably extract the mineral, the record is not clear as to what is the full extent of the quantity of the pumice on the claim. Suchy estimated that there was a half million tons on Claim No. 2 (*compare* 1 Tr. 42 *with* 2 Tr. 18). That estimate and his methods of reaching it were disputed by claimant's experts. (*See, e.g.*, 1 Tr. 149). No other estimates for the entire claim were proffered, however.

Judge Mesch noted that the evidentiary record indicated that only a total of 650 tons of pumice had been marketed over a period of 24 years. Were we to base our estimates of the reasonably foreseeable market solely on the basis of past production, it would be clear that the amount of pumice solely on Claim No. 2 would be greatly in excess of that which might reasonably be deemed to have any present value. There are other factors, however, which we feel are properly considered in making this determination.

First, we have noted that the testimony of Suchy was criticized by certain of appellants' witnesses. As an example, in the 1964 hearing Suchy had testified that 50 to 60 thousand tons of marketable pumice existed on the east half of Lot 6, consisting of 17 acres (1 Tr. 42). The east half of Lot 6 had not been contested by the Forest Service at the time of the 1964 hearing. Leslie C. Richards, who the Government had stipulated was an expert witness (1 Tr. 16), estimated that the total amount of merchantable pumice in the east half of Lot 6 was 8,500 tons (1 Tr. 153–55). Thus, the Government's estimate was over 500 percent greater than that of appellants' expert.

Second, we have already made reference to appellants' assertion that they purposefully held down production. In the 1976 hearing, appellants submitted a copy of a letter from the Buying Department of the Procter & Gamble Co., requesting a copy of their price indications based on an estimated rate of 2,700 tons a year (2 Tr. 121, Exhibit E). Given the wide variance in the estimated quantities of the pumice, plus the reasonable anticipation of an increased market for the mineral should the production facilities be upgraded, we are unable to say that excess reserves existed within the physical boundaries of Claim No. 2.[8]

When we examine the other claims, however, it seems apparent that any reasonably foreseeable market increase would be more than adequately supplied by the material found on Claim No. 2. Suchy testified that there were 500,000 tons of usable pumice on Claim No. 1, and 250,000 tons on Claim No. 3 (2 Tr. 18). Suchy provided no estimate as to Claim No. 4, probably owing to the fact that he found no usable pumice within the limits thereof (2 Tr. 13). It is unnecessary for us to decide whether lump pumice does, in point of fact, exist on Claim No. 4, inasmuch as we feel that it is clear that any pumice deposits which are located on other claims would clearly be in excess of any foreseeable market demand.

Assuming that only half of the pumice estimated by Suchy actually existed in Claim No. 2, and assuming appellants were able, on a *yearly* basis to produce 3,000 tons (which we note is more than four times their *total* production to date), the mineable reserves should last for over 83 years. Any additional reserves would have so attenuated a value that they could scarcely be said to possess any present value whatsoever. Thus, we have no recourse but to hold that Claims Nos. 1, 3, and 4 are invalid since the minerals embraced within their limits have now, and had in 1945, no present value.

[11] Since the primary purpose of validating a claim is so that the minerals can be extracted and marketed, appellants must

---

[8] In light of our disposition, we do not now pass on the question of whether the existence of excess reserve within a single claim in which a discovery exists, can serve as a predicate for a declaration of invalidity as to those positions which are excess.

also show that marketability has continued since discovery and that the minerals can presently be profitably extracted. *United States* v. *Harenberg*, *supra*. The record provides considerable evidence of development of the claims since 1945 to support a conclusion that Claim No. 2 is presently valuable for lump pumice. By stipulation of the parties, lump pumice from the claim has been continuously marketed at a profit since 1946. It sells for a variety of commercial uses. Although appellants have limited production up to this time because they have no patent and because of Forest Service requests to restrict their activities, they have investigated the market and have additional customers whose business may be available to them (2 Tr. 120–22, 125). We find no evidence in the record which would substantiate a finding of a lack of present marketability.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as to Claims Nos. 1, 3, and 4 and reversed as to Claim No. 2 which is hereby held to be valid in its entirety.

JAMES L. BURSKI
Administrative Judge

I CONCUR:

NEWTON FRISHBERG
Chief Administrative Judge

ADMINISTRATIVE JUDGE FISHMAN CONCURRING SPECIALLY:

I concur in the main opinion except as indicated below.

This opinion recites in part that "issuance of a [Forest Service] special use permit could not operate to withdraw the land from mining or mineral location. *A. W. Schunk*, 16 IBLA 191, 81 I.D. 401 (1974)."

As stated in *Schunk*, the Forest Service Manual, sec. 2811.25, recites that lands used or occupied under a special land use permit are ipso facto closed to mineral entry.

Both of these positions, enunciated as universal principles, are not correct. I adhere to the rules enunciated in *Schunk* that a special use permit, issued by the Forest Service for a privately-owned electric transmission line does not close the land to mineral entry.

We also pointed out in *Schunk* that the Forest Service Manual relies on *United States* v. *Mobley*, 45 F. Supp. 407 (N. D. Calif. 1942), and *Schaub* v. *United States*, 207 F.2d 325 (9th Cir. 1953), as supporting its conclusion that the issuance of such a permit closes the land to mineral entry. In *Schunk*, we stated that *Mobley's* discussion of the issue was obiter dicta, since the court found that the mining claim was null and void for lack of a discovery of a valuable mineral.

Schunk discussed *Schaub* at 81 I.D. at 403 as follows:

> In *Schaub* a material site had been designated for use in connection with Federal Aid Highway construction under 23 U.S.C. § 18 (1946), now § 317 (1970). The material pit was also designated for

special use under the Act of March 30, 1948, 62 Stat. 100 (formerly 48 U.S.C. § 341 (1954). Under that Act, the Secretary of Agriculture may authorize use of national forest lands in Alaska for various purposes:

> "* * * and after such permits have been issued and so long as they continue in full force and effect the lands therein described shall not be subject to location, entry, or appropriation, under the public land laws or mining laws, or to disposition under the mineral leasing laws: * * *."

The Court held that the federal use of the lands for material site purposes effectively closed the lands from further appropriation.

In *Schaub* the mineral claimant sought to acquire mineral materials which were then being mined by or for the United States for federal use.

The Forest Service issues special use permits for virtually every kind of occupancy.[1]

Thus it appears that a special land use permit is effective to bar mining locations where the applicable statute authorizing the issuance of the permit constitutes the issuance thereof as an appropriation of the land. This is not to say that other circumstances attending the issuance of a special land use permit may not bar mining locations. For example, if the Forest Service issued a special land use permit for the construction of a hotel, which was built, we probably would be hard put to deny that the situs of the hotel was closed to mining. *See United States* v. *McClarty*, 17 IBLA 20, 50–53, 81 I.D. 472, 485–7 (1974); *John W. Pope*, 7 IBLA 73 (1974).

FREDERICK FISHMAN,
Administrative Judge.

---

[1] 36 CFR 251.1 provides in part as follows:

"(a) *Special uses.* (1) All uses of national forest lands, improvements, and resources, including the uses authorized by the act of March 4, 1915 (38 Stat. 1101), as amended July 28, 1956 (Pub. L. 829, 84th Cong.; 70 Stat. 708; 16 U.S.C. 497), the act of March 30, 1948 (62 Stat. 100, 48 U.S.C. 341), and section 7 of the act of April 24, 1950 (64 Stat. 84; 16 U.S.C. 580d), and excepting those provided for in the regulations governing the disposal of timber and the grazing of livestock or otherwise specifically authorized by acts of Congress, shall be designated 'special uses,' and shall be authorized by 'special use permits.'

* * * * *

"(c) *Other authorizations.* The Chief of the Forest Service is also authorized to issue permits, execute leases, and grant easements as follows:

"(1) Permits under the act of June 8, 1906 (34 Stat. 225; 16 U.S.C. 431, 432), for the examination of ruins, the excavation of archaeological sites, and the gathering of objects of antiquity in conformity with the uniform rules and regulations prescribed by

(Continued)

the Secretaries of the Interior, Agriculture, and War, December 28, 1906 (43 CFR 3.1 to 3.17).

"(2) Leases of land under the act of February 28, 1899 (30 Stat. 908; 16 U.S.C. 495), in such form and containing such terms, stipulations, conditions, and agreements as may be required in the public interest.

"(3) Easements for rights-of-way for poles and lines, including telephone and telegraph lines, for communication purposes, and for radio, television, and other forms of communication transmitting relay, and receiving structures and facilities, under the provisions of the act of March 4, 1911 (36 Stat. 1253, 16 U.S.C. 523), as amended by the act of May 27, 1952, (Pub. L. 367, 82d Cong., 2d Sess., 66 Stat. 95), subject to such payments as maybe equitable and to such stipulations as maybe required for the protection and administration of the national forests.

"(4) Permits, leases, and easements as authorized by the act of September 3, 1954 (Pub. L. 771, 83d Cong.), to States, counties, cities, towns, townships, municipal corporations, or other public agencies for periods not in excess of 30 years, at prices representing the fair market value, fixed by the Chief, Forest Service, through appraisal, for the purpose of constructing and maintaining on such lands public buildings or other public works."

APPEAL OF THE HOLLOWAY COMPANIES

IBCA-1182-3-78

Decided *February 11, 1980*

Contract No. 6-07-DC-7150, Specifications No. DC-7175, Bureau of Reclamation.

Denied.

Contracts: Construction and Operation: Changed Conditions (Differing Site Conditions)—Contracts: Disputes and Remedies: Equitable Adjustments

Where, under the standard Differing Site Conditions Clause of the contract, a construction contractor claims entitlement to increased costs caused by heavy rains or other adverse weather conditions, and the undisputed facts indicate no fault on the part of the Government, the contractor has failed to state or prove a claim upon which relief may be granted.

APPEARANCES: Mr. Dan Holloway, President, The Holloway Companies, Wixom, Michigan, for appellant; Mr. William A. Perry, Department Counsel, Denver, Colorado, for the Government.

OPINION BY ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF CONTRACT APPEALS

Background

This case concerns a claim by a construction contractor (Holloway or appellant) for alleged extra costs incurred primarily because of 2 days of excessive rainfall in June 1977 based upon Clause 4 of the General Provisions of its standard construction contract with the Bureau of Reclamation (Bureau).

The contract was dated Jan. 16, 1976, and required Holloway to construct and complete Palmetto Bend Dam, on the Navidad River near Edna, Jackson County, Texas, in accordance with the associated specifications. The estimated contract price was $24,911,492.

By letter of June 16, 1977, Holloway furnished notice to the Bureau of delay due to excessive rainfall on June 15, 1977, and requested an extension of the contract completion time equivalent to the number of days it took to restore the construction site to the condition of the site prior to June 15, 1977. In addition, the contractor requested additional compensation for labor, equipment, and materials used to restore the construction site.

In his Finding of Fact and Decision, dated Jan. 10, 1978, the contracting officer found from official records of the Government weather station, located at Victoria, Texas, which is approximately 25 miles from the construction site, that:

1. For the 30-year period from 1941 through 1970, the normal precipitation for the month of June is 3.31 inches;

2. The total precipitation for June 1977 was 12.21 inches, which is a departure from the normal of 8.90 inches or 269 percent above normal; and

3. On June 15, 1977, the rainfall was 9.3 inches.

From the project records, the contracting officer determined:

1. That during an 18-hour time period from 5 p.m. on June 14, 1977, to 11 a.m. on June 15, 1977, approximately 9 inches of rain fell at the construction site;

2. That flooding of the construction ensued;

3. That the contractor began cleaning up and repairing the damage resulting from the flood on June 16, 1977;

4. That the contractor was able to restore the construction site to its condition prior to the excessive rainfall by June 29, 1977; and

5. That during the 14-calendar day time period from June 15 through June 28, 1977, the contractor was not able to pursue normal construction activities.

Based on the foregoing findings, the contracting officer awarded the contractor an extension of 14 calendar days to the time for completion of the contract work. This award was made on the ground of excusable cause for delay under the provisions of Clause 5 of the General Provisions of the contract.[1] However, because there was no provision therefor in the contract, the contracting officer denied the contractor's request for additional compensation for costs associated with the cleanup and repair of the flood damage. The contractor appealed to this Board from the contracting officer's denial of payment for the claimed costs.

In a letter to the Bureau, dated Feb. 21, 1978, treated as its notice of appeal, Holloway stated:

> We accept the fourteen (14) days allowed for an extension of time as stated in your decision. However, we feel that we are entitled to some monetary compensation. We feel that through no fault of this contractor or failure of facilities provided to protect the work, we suffered damage, not only to the site, but to the permanent work also. We believe that this occurrence was of such a nature, that it exceeds the intent expressed in the contract documents.

Although Holloway failed to file a complaint within the time required by the procedural regulations, the Board, by its order of May 3, 1978, extended the time 30 days for Holloway to file its complaint. The complaint was filed on

---

[1] Clause 5 is entitled, "TERMINATION FOR DEFAULT—DAMAGES FOR DELAY—TIME EXTENSIONS." Paragraph (d) thereof provides as follows:

"(d) The Contractor's right to proceed shall not be so terminated nor the Contractor charged with resulting damage if:

"(1) The delay in the completion of the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contraçtor, including but not restricted to, acts of God, acts of the public enemy, acts of the Government in either its sovereign or contractual capacity, acts of another contractor in the performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargos, unusually severe weather, or delays of subcontractors or suppliers arising from unforeseeable causes beyond the control and without the fault or negligence of both the Contractor and such subcontractors or suppliers; and

"(2) The Contractor, within 10 days from the beginning of any such delay (unless the Contracting Officer grants a further period of time before the date of final payment under the contract), notifies the Contracting Officer in writing of the causes of delay.

"The Contracting Officer shall ascertain the facts and the extent of the delay and extend the time for completing the work when, in his judgment, the findings of fact justify such an extension, and his findings of fact shall be final and conclusive on the parties, subject only to appeal as provided in Clause 6 of these General Provisions."

(Continued)

May 24, 1978. It consisted of general allegations of adverse weather conditions encountered during the construction project, confirmation of the contracting officer's finding that 14 calendar days were required to restore the site to a workable condition, and a general description of work performed to accomplish necessary dewatering, reexcavation and cleanup. The crux of the complaint was contained in the following paragraph:

> We believe that the hardships created by the period of weather from November 15, 1976 to March 12, 1977 and the unexpected downpour of June 14 and 15, 1977 constitute a changed site condition. Both of these happenings were unknown physical changes at the site. Both of these events vastly altered our approach to the construction of this Project. Clause 4 of the General Provisions provides for such differing site conditions.

The final paragraph of the complaint contained a request for the "sum of $53,841.53 as monetary compensation for the cleanup and restoration of the site to a workable condition after the downpour of June 14 and 15, 1977."

By its answer, the Government admitted the allegations of the complaint, except it denied that the weather events described in the complaint constituted a differing site condition and denied that such events entitled the appellant to additional compensation. The Government requested that the Board deny the subject appeal for failure to state a claim for which relief may be granted.

The appeal was submitted for decision on the record without a hearing pursuant to an order of the Board settling the record.

Discussion

No issue of fact is presented by this appeal and the only issue of law involved is whether a construction contractor is entitled to a monetary payment for alleged additional costs incurred as a result of adverse weather conditions under Clause 4, Differing Site Conditions, of the General Provisions of the standard construction contract, Form 23–A.[2]

As pointed out in the Government's brief, the law is well settled: that a contractor may not recover increased costs which result from adverse weather conditions, absent a contract provision which allows it; and, that weather conditions, whether normal or unusually severe, do not constitute a differing site condition under Clause 4 of the General Provisions of the standard construction contract.

---

[2] Clause 4 provides:

"4. DIFFERING SITE CONDITIONS

"(a) The Contractor shall promptly, and before such conditions are disturbed, notify the Contracting Officer in writing of: (1) Subsurface or latent physical conditions at the site differing materially from those indicated in this contract, or (2) unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in this contract. The Contracting Officer shall promptly investigate the conditions, and if he finds that such conditions do materially so differ and cause an increase or decrease in the Contractor's cost of, or the time required for, performance of any part of the work under this contract, whether or not changed as a result of such conditions, an equitable adjustment shall be made and the contract modified in writing accordingly.

"(b) No claim of the Contractor under this clause shall be allowed unless the Contractor has given the notice required in (a) above; provided, however, the time prescribed therefor may be extended by the Government.

"(c) No claim by the Contractor for an equitable adjustment hereunder shall be allowed if asserted after final payment under this contract."

For example, in *Arundel Corp. v. The United States*, 103 Ct. Cl. 688 (May 7, 1945), *cert. denied*, Oct. 15, 1945, and *rehearing denied*, Nov. 13, 1945, involving a dredging contract, the Court of Claims held that the action of a hurricane was not a changed condition under Article 4 of the contract which would entitle plaintiff to an increase in the unit price because of the increased cost due to the decreased amount of work. In *Charles T. Parker Construction Co.*, IBCA-335 (Jan. 29, 1964), 71 I.D. 6 at p. 10, 1964 BCA par. 4017 at pages 19,792 and 19,793, this Board stated:

> It is well settled by the courts and by opinions of this Board that where work is damaged before completion and acceptance by an Act of God or by other forces of nature, without the fault of either party, and in the absence of a contract provision shifting the risk of such loss to the Government, the contractor is obligated to repair the damage at its own expense.

Other decisions by this Board to the same effect include: *Concrete Construction Corp.*, IBCA-432 (Nov. 10, 1964), 71 I.D. 420, 65-1 BCA par. 4,520; *Montgomery-Macri Co. & Western Line Construction Co.*, IBCA-59 and IBCA-72 (June 28, 1963), 70 I.D. 242, 1963 BCA par. 3,819; and *Appeal of M & P Equipment Co.*, IBCA-1088-11-75 (Sept. 28, 1979), 86 I.D. 527, 79-2 BCA par. 14,094.

Decision

Based upon the undisputed facts in this case and the above-cited authorities, we hold that appellant has failed to allege or prove a claim for which relief may be granted.

Accordingly, the appeal is denied.

DAVID DOANE
Administrative Judge

I CONCUR:

RUSSELL C. LYNCH
Administrative Judge

CONSOLIDATION COAL CO.

2 IBSMA 21

Decided *February 13, 1980*

Appeal by Consolidation Coal Co. of Administrative Law Judge William J. Truswell's decision on remand of IBSMA 79-25 upholding entry by an OSM inspector without prior presentation of credentials on the basis that extraordinary circumstances existed for doing so. (Docket No. IN 9-9-R; IBSMA 79-25.)

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Inspections

Where extraordinary circumstances exist an entry made by an inspector without prior presentation of credentials complies with the requirements of 30 CFR 721.12(a).

APPEARANCES: Daniel E. Rogers, Esq., Senior Counsel, Pittsburgh, Pennsylvania, for Consolidation Coal Co.; Shelley D. Hayes, Esq., and Marcus P.

McGraw, Esq., Assistant Solicitor for Enforcement, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

Consolidation Coal Co. (Consolidation) has appealed Administrative Law Judge Truswell's Nov. 28, 1979, decision on remand of IBSMA No. 79–25.[1] In that decision we construed 30 CFR 721.12(a) to require an Office of Surface Mining Reclamation and Enforcement (OSM) inspector to present credentials at the earliest practical opportunity except under extraordinary circumstances. We remanded so that a determination could be made whether or not sufficient conditions existed in this case to warrant entry without a prior presentation of credentials.[2]

The Administrative Law Judge recounted the facts pertinent to this question in his decision:

> Inspector Marvin Utsinger testified: that on his initial inspection of November 8, 1978 he noticed somewhat of an odd occurrence in that while it had been dry for several days he did not expect to see water flowing in the ditches (Tr. 10); that there was evidence that there had been pumping in the ditch area just prior to his observation (Tr. 15); that "it looked like the pump had just been pulled out of there" (Tr. 15); that "there was still some sections of drain pump hose in the ditch and the pump hose was wet" (Tr. 15); that it appeared pumping had ceased shortly before he arrived at that point (Tr. 16); that the ditches were approximately ten minutes travel time away from the mine office (Tr. 10); and, that while it is his normal procedure to check in at the mine site office and identify himself before making an inspection he did not do that on November 20th because he felt the pump would have been turned off while he was at the mine site office (Tr. 19).
>
> Mine superintendant [*sic*] Charles Richard Clinton testified that he has a radio in his office, is in instant communication with the whole mine, and the pump in question could be shut down in 5 minutes if somebody was on the south side of the mine (Tr. 58–59).[3]

[1] As is indicated in the decision on remand, Consolidation states that these facts are sufficient to bring the case within the scope of an "extraordinary circumstances" exception.[4] Counsel for Consolidation adds that he "frankly [does] not see any way that I could counter that evidence since it all depends upon Marvin Utsinger's state of mind."[5] We stated in our original decision, however, that whether or not extraordinary circumstances exist does not depend merely on the inspector's state of mind: "We assume extraordinary circumstances will be rare and that OSM will be able adequately to demonstrate such existed if there are challenges to enforcement actions based on entry without presentation of creden-

---

[1] 1 IBSMA 273, 86 I.D. 523 (1979).

[2] IBSMA 273 at 277–78, 86 I.D. 523 at 525–26 (1979).

[3] Decision at 1–2.

[4] "[C]ounsel for applicant advised: 'If you are to follow the Board's rationale to the letter, I do not think that any further hearings on the matter are necessary * * *. Under the Board's rationale I believe there is sufficient evidence on the record to find that Mr. Utsinger's entry on November 20 was a lawful entry.'" Decision at 2.

[5] Decision at 2. This statement was apparently based on a misunderstanding of the Board's original decision.

tials."[6] Right-of-entry without prior presentation of credentials is warranted in order to minimize instances in which an operator's violation may escape detection.[7] Each case where such an entry occurs must be measured against its own facts to determine whether, objectively, entry without prior presentation of credentials was justified.

The Administrative Law Judge concluded the facts in this case indicate that there were extraordinary circumstances which warranted an entry without prior presentation of credentials. Our review has revealed no reason to disturb that conclusion. The decision on remand is therefore affirmed.

Will A. Irwin
Chief Administrative Judge

Melvin J. Mirkin
Administrative Judge

LITTLE SANDY COAL SALES

2 IBSMA 25

Decided *February 19, 1980*

Appeal by Little Sandy Coal Sales from that part of a Sept. 20, 1979, decision by Administrative Law Judge William J. Truswell, upholding the validity of Violation No. 1 of Notice of Violation 79–II–29–13 (Docket No. NX 9–56–R) issued by the Office of Surface Mining Reclamation and Enforcement pursuant to the Surface Mining Control and Reclamation Act of 1977.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Approximate Original Contour—Surface Mining Control and Reclamation Act of 1977: Backfilling and Grading Requirements: Generally

Elimination of a highwall is a specific requirement of 30 CFR 715.14 which must be satisfied in order to achieve approximate original contour. If a highwall has not been eliminated, it necessarily follows that return to approximate original contour has not been accomplished.

APPEARANCES: Edgar B. Everman, Grayson, Kentucky, for Little Sandy Coal Sales; John P. Williams, Esq., Office of the Field Solicitor, Knoxville, Tennessee, and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

Little Sandy Coal Sales (Little Sandy) has appealed part of a deci-

---

[6] 1 IBSMA 273 at 277; 86 I.D. 523 at 525 (1979).

[7] As we noted in our original decision: "[T]here is no question that the Department contemplated legal entry in some circumstances where no prior presentation of credentials would be advisable or capable of being performed. Comment 11 to Part 721 reads, in part, as follows:

"It is not intended that inspections be restricted to 'normal business hours' if the exigencies or violations justify inspection at other times. An example would be attempts to detect illegal discharges or other night-time activities which are prohibited by the Act or regulations. 42 FR 62664 (Dec. 13, 1977)."

1 IBSMA 273 at 276, n.2; 86 I.D. 523 at 525 (1979), n.2.

(Continued)

sion of Administrative Law Judge William J. Truswell, dated Sept. 20, 1979, upholding the validity of three violations in Notice of Violation No. 79–II–29–13 (Notice of Violation No. 1) and one violation in Notice of Violation No. 79–II–28–12 (Notice of Violation No. 2). Little Sandy indicated in its brief to the Board that the only violation appealed was Violation No. 1 of Notice of Violation No. 1. The violation was described in the notice as a failure to eliminate a highwall and to restore a portion of the disturbed area to its approximate original contour (AOC) as required by the backfilling and grading requirements 30 CFR 715.14.

We have reviewed the record in this case and agree with the conclusion below concerning Violation No. 1. We affirm.

Factual and Procedural Background

On Apr. 30, 1979, inspectors from the Office of Surface Mining Reclamation and Enforcement (OSM) visited a surface mine in Carter County, Kentucky, and issued Notice of Violation No. 1 to Little Sandy pursuant to sec. 521(a)(3) of the Surface Mining Control and Reclamation Act of 1977 (Tr. I 12–13).[1] At that time there was no mining activity, and no equipment was on the site (Tr. I 10–11). The notice listed three violations of the initial Federal general performance standards.[2] Violation No. 1 was an alleged backfilling and grading violation which is the subject of this appeal.

On May 14, 1979, Little Sandy filed an application for review of this notice. One week later Ford Energy Corp., designated as the operator on the notice of violation, also filed an application for review of the same notice. On June 11, 1979, an OSM inspector visited the minesite again and terminated all the violations in Notice of Violation No. 1. He indicated on the termination notice (Exh. R–3) that Violation No. 1 was terminated because it had been abated.[3] This inspector and the OSM inspector who originally issued Notice of Violation No. 1 returned to the site on June 22, 1979, and issued Notice of Violation No. 2 containing one violation for allegedly failing to eliminate the highwall and failing t return to AOC the same area encompassed by Violation No. 1 o the previous notice.

On June 25, 1979, Little Sandy applied for review of the second notice and also sought temporary relief from its requirements. A hearing was held on July 2, 1979 at the conclusion of which OSM agreed to extend the abatement period from July 16 to Sept. 20, 1979 and not to assess a civil penalty o history point for the second notic of violation.

A hearing on the merits of th violations contained in the two no tices of violation was held on Aug. 20, 1979, and on Sept. 20, 1979, a decision was issued sustaining all the violations in the two notices. Little Sandy filed a timely appeal; Ford Energy Corp. did not.

---

[1] 30 U.S.C. § 1271(a)(3) (Supp. I 1977). ("Tr. I" refers to the transcript of the July 2, 1979, temporary relief hearing and "Tr. II" to the transcript of the hearing held on August 20, 1979).

[2] 30 CFR Part 715.

[3] He testified at the July 2, 1979, temporar relief hearing that at that time he did not hav a copy of the notice with him and that h understood that the remedial action require was elimination of the highwall (Tr. I 51).

Discussion

[1] Little Sandy was cited by OSM for failing to eliminate the highwall and failing to restore the area to AOC. Elimination of a highwall is a specific requirement of 30 CFR 715.14 which must be satisfied in order to achieve AOC.[4] If a highwall has not been eliminated, it necessarily follows that return to AOC has not been accomplished. Therefore, the resolution of this appeal turns on the question whether the highwall had been eliminated on Apr. 30, 1979.[5]

The OSM inspector who issued Notice of Violation No. 1 on Apr. 30, 1979, testified that it "visually was pretty obvious" that the area had not been returned to AOC. The inspector took slope readings which confirmed that the observed slope was steeper than the premining slope (Tr. I 17–18). OSM and State officials were in agreement that the highwall had not been eliminated in April 1979 (Exh. R–16; Tr. II 79–81). An OSM inspector reported that on June 22, 1979, when Notice of Violation No. 2 was issued, Little Sandy "had pretty well gotten to eliminating the highwall," but that it had not restored the area to AOC (Tr. I 16; Tr. II 21–23). A State inspector's report for the same day indicated that the highwall had not been eliminated and the area had not returned to AOC (Exh. R–17; Tr. II 82–88).[6]

The testimony of the OSM inspector who issued Notice of Violation No. 1 and the evidence that OSM and the State were in agreement concerning the existence of a backfilling and grading violation were adequate to establish that Little Sandy had not eliminated the highwall and returned the area to AOC on Apr. 30, 1979. Little Sandy failed to provide sufficient evidence to the contrary.

Little Sandy also argues that OSM should have recognized a 6-month extension of a State notice of noncompliance and order for remedial measures which was granted on Dec. 11, 1978, by the Kentucky Department of Natural Resources and Environmental Protection. The extension was to allow Little Sandy to complete reclamation of the site, including returning the area in question to AOC. While Little Sandy might view the enforcement action taken by OSM during the period of the State extension to be unwarranted, there is no doubt that OSM had the authority to take such action. In *Eastover Mining Co.*, 2 IBSMA 5, 87 I.D. 9 (1980), the Board held that OSM is authorized to issue a notice of violation even if the state has already initiated enforcement action for the same violation.

---

[4] The relevant part of 30 CFR 715.14 reads as follows:

"In order to achieve the approximate original contour, the permittee shall, except as provided in this section, transport, backfill, compact (where advisable to ensure stability or to prevent leaching of toxic materials), and grade all spoil material *to eliminate all highwalls*, spoil piles, and depressions. * * * The postmining graded slopes must approximate the premining natural slopes in the area as defined in paragraph (a)" (italics supplied).

[5] The parties offered conflicting expert testimony from registered professional engineers concerning premining and postmining slope readings (Tr. I 78–84, 113–115; Exh. R–6; Tr. II 119–120, 131–133; Exh. A–5). Much of the disagreement resulted from differing methods of on-ground measurement (Tr. II 156–158, 178–181; Exh. A–5). However, because of the basis of this opinion, it is not necessary to sort out these differences in this case.

[6] The State inspector began inspecting Little Sandy's operation in July 1978 and had made about 25 visits to the site at the time of the hearing (Tr. II 69–70). During September 1978 the inspector filed two inspection reports which informed Little Sandy of the necessity of eliminating the highwall and returning the area to AOC (Exh. R–11 and R–12). The State issued a notice of noncompliance and order for remedial measures on Oct. 5, 1978, requiring Little Sandy to eliminate the highwall and achieve AOC (Tr. II 72; Exh. R–20).

Our review of the record reveals no reason to overturn the Administrative Law Judge's conclusion concerning the first backfilling and grading violation. Therefore, that part of the decision appealed from is affirmed.

WILL A. IRWIN,
Chief Administrative Judge.

MELVIN J. MIRKIN,
Administrative Judge.

ESTATE OF LEONA HUNTS ALONG HALE

8 IBIA 8

Decided *February 20, 1980*

Appeal from order by Administrative Law Judge Daniel S. Boos approving will and ordering distribution.

Affirmed.

1. Indian Probate: Wills: Testamentary Capacity: Witnesses' Testimony

Where the agency clerk to whom decedent dictated her will had known the decedent and her family since the clerk was 10 years old, and the clerk's testimony established that the testatrix knew the nature and extent of her property, remembered and discussed the personal situations of each of her children, and had made a testamentary plan by which she wished to distribute her property, the fact that one of her children benefited more than any of the others did not tend to show the decedent lacked testamentary capacity, nor was the testamentary plan unreasonable.

2. Indian Probate: Wills: Testamentary Capacity: Witnesses' Testimony

Where the witnesses to an Indian will were nurses at the hospital where decedent spent her last illness and testified that they had observed her conduct as a patient and her behavior with her family and felt her to be competent and able to understand what she was doing when she made a will, the reluctance of decedent's attending physician to commit himself to an opinion concerning the ability of decedent to understand "legal documents" did not tend to contradict the nurses' testimony that decedent was competent to make a will, nor did it indicate that decedent lacked testamentary capacity.

APPEARANCES: Robert W. Holte, Esq., for appellants Edward O. Hale and Timothy Hale; James P. Fitzsimmons, Esq., for appellee Sherman Hale.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

INTERIOR BOARD OF INDIAN APPEALS

On June 21, 1977, Leona Hunts Along Hale, the beneficial owner of interests in trust real property, died at Minot, North Dakota, at the age of 65. She was survived by 6 children, whose ages ranged from 47 to 19 at the time of her death. Her will dated June 17, 1977, was approved by the Administrative Law Judge's order on Apr. 9, 1979. Appellant Edward Hale, her oldest son, is bequeathed $1 by the will, as is one of his sisters. Appellant Timothy Hale, together with another of appellants' sisters, is named devisee of a questioned interest in two lots and a house not included in the trust property in probate by the Department. Appellee Sherman L. Hale, the youngest son, is the principal beneficiary of the will and the named devisee of decedent's interest in 15 trust allotments, as well as any residual property not specifically described. A third daughter of decedent is named devisee of decedent's interest in allotment No. 668A which was subject to sale at the time of the making of the will. A codicil to the will also published on June 17, 1977, which appears on the "Affidavit to Accompany Indian Will" form provided by the Department, provides for conditional bequests to five named beneficiaries of income from the possible sale of decedent's interest in allotment No. 668A.

At a series of probate hearings on Apr. 18, Sept. 19, and Nov. 30, 1978, appellants sought to show decedent lacked testamentary capacity on the day she made her will. On appeal they urge the order approving will should be vacated and the will held invalid for the same reason.

Although testamentary capacity is the sole issue specified on appeal, appellants rely upon six circumstances to support their position. Thus they contend that (1) the record does not affirmatively show decedent asked for help from the agency in drafting a will, and suggests the agency assistance was procured by others acting improperly; (2) the demonstrated reluctance of the subscribing witnesses to attend the probate hearings indicates their testimony was not worthy of belief and the testimony of the attending physician should be relied upon instead to show decedent lacked testamentary capacity; (3) decedent failed to supply sufficient reasons to explain her testamentary scheme, a circumstance that indicates she did not know the extent of her property; (4) the testamentary plan is irrational and inconsistent with decedent's demonstrated affection for appellants; (5) the appearance of the signature made on the will indicates, when compared with signatures made by decedent 10 years before, the decedent was no longer competent; and (6) the testamentary scheme itself is so unnatural as to shock the conscience and require distribution according to the statutory provisions used in cases of intestate succession. Since the first five points are primarily factual, the last contention is first addressed.

[1] The limitations imposed upon an Indian testatrix to dispose

of her trust property are defined by the holding in *Tooahnippah* v. *Hickel*,[1] which indicates that a will executed in conformity to Departmental regulation is valid, absent proof of the successful imposition of the will of another for that of the testatrix.[2] The Secretary is without power to rewrite wills otherwise in conformity to Departmental regulation, simply because the testamentary scheme does not conform to popular or personal notions of fitness.[3]

Some of appellants' first five points do touch upon whether there was an attempt to influence decedent improperly, as well as the question of her capacity. Accordingly, both issues are considered in the following review of contentions 1 through 5.

(1) *The agency clerk.* Since she was about 10 years of age, the clerk assigned by the agency to prepare the will had known decedent. The clerk and decedent's daughters had played together and gone to school together. At the hospital on June 17, 1977, decedent and the clerk were alone together in decedent's room while they discussed the contents of decedent's will. Decedent dictated the will terms while explaining parenthetically the reasons for wanting to make the division of her trust property which she described. She declared that she felt an obligation to help her youngest child, and stated her belief that he needed the largest part of her trust estate. When the will was typed, it was read to decedent and witnessed by decedent's nurse and the head nurse. After the will was drafted, but before it was executed however, decedent decided she also wished to make a conditional disposition of sale proceeds from one of the allotments which was pending sale, and at her direction a codicil providing for the contingency was made and executed at the same time the will was signed. The clerk and both nurses witnessing the will agree that decedent was alert and knew what she was doing when she signed the will. Although decedent's hands were badly swollen from the progression of her disease so that she had difficulty holding the pen when she signed, the head nurse noted that June 17 was "one of Leona's better days."

The circumstances described indicate the decedent had asked for someone to help her draw a will. Whether she had personally conveyed the request to the agency is, under the circumstances, extremely unlikely, since she was confined to her hospital bed. The record shows that she had her plan of disposition ready, discussed her property and her family situation in detail, dictated the terms of the will herself and showed generally that she was ready to make her will and wanted to do so. Nothing in the circumstances surrounding her contacts with the agency clerk suggests there was any improper influence used to procure the preparation of decedent's will.

---

[1] 397 U.S. 598 (1970). Numerous Departmental decisions have considered these same issues since 1970; for a discussion of those opinions *see Estate of Joseph Caddo,* 7 IBIA 286 (1979).

[2] But *see* the concurring opinion in *Tooahnippah* v. *Hickel*, 397 U.S. 619, where Mr. Justice Harlan opined that wills disinheriting certain persons should be carefully considered "[i]f such a will was the result of overreaching by a beneficiary, or fraud; if the will is inconsistent with the decedent's existing legal obligation of support, or in some other way clearly offends a similar public policy; or if the disinheritance can be fairly said to be the product of inadvertance * * *." The testamentary circumstances in this case are also examined against this stated standard.

[3] In *Akers* v. *Morton*, 499 F.2d 44 (9th Cir. 1974) *cert. denied* 423 U.S. 831 (1975), the court, following *Tooahnippah*, affirmed the Secretary's approval of a will disinheriting a wife even though the circumstances favoring the wife's claims were most compelling.

[2] (2) *The subscribing witnesses.* The record shows that the two nurses from Minot were reluctant to come to New Town for the probate hearings. They did, however, attend the November 1978 session, which was concerned exclusively with their testimony. Although the parties were represented by counsel, significantly neither lawyer inquired about the reasons for the witnesses' reluctance to appear at the earlier hearing. The consistent, uncontradicted, and unimpeached testimony of both nurses is in accord that decedent was competent when she signed the will. Both witnesses give reasons for thinking that decedent knew what she did when she signed. They describe in detail her conduct as a patient and her behavior when her family visited her. The testimony of the head nurse also shows she had known decedent previously and based her opinion that decedent was able to comprehend her acts not only upon their most recent contacts, but also upon prior acquaintance. In contrast, the testimony of the attending physician was vague concerning the ability of decedent to function during her last illness. He testified in detail concerning the symptoms of diabetes and the effect the disease had upon decedent's body. He was unwilling to express an opinion about the effect the sickness may have had upon her mind, and he said so. His testimony tends to support the nurses' testimony with details concerning decedent's specific ailments. Nothing in the circumstances of the testimony of the subscribing witnesses reflects doubt upon the capacity of decedent as a testatrix.

3. *The reasoning of the testamentary plan.* Although the will does not contain a written explanation after each devise or bequest, the testimony of the agency clerk supplied exactly that. There is much more explanation given here than is usually the case. (Indeed, in the ordinary case, no such explanation is necessary.) However, perhaps since decedent and the clerk were acquainted, the drafting process included both discussion and explanation of the course of events in decedent's family (all of whom were known to both women), and a reason for each devise or bequest in relation to the personal situation of each child was supplied. Were there some showing in this case of an attempt to influence decedent, her statement of reasons for the dispositions made by her will would rebut it. Also, had there been a deterioration in decedent's mental condition, the detailed discussion and analysis described by the clerk should have revealed that as well. The complete openness of the testatrix with the

agency clerk throughout the entire transaction dispels any doubts that might be raised by the will's plan of distribution. Under the circumstances described, the plan appears to be neither neglectful nor unnatural.

(4) *The logic of the testamentary plan.* Despite the fact one son received more property from the will than both appellants combined and the record indicates all children were well regarded by their mother, it does not necessarily follow that the unequal distribution can only be explained by lack of testimentary capacity. Such a conclusion, in the absence of facts to support it, merely indicates a tendency to equate affection to a system of monetary reward. Preference may be given by a will for one child over another for reasons other than the personal preference of the testatrix. In this case the decedent stated such reasons when she dictated her will; she stated that a sense of obligation to her youngest child, together with a sense the others did not need assistance, dictated the disposition chosen. It is conceivable, but immaterial, that her personal inclinations had she followed them instead of a sense of maternal duty, might have dictated other choices. Indeed, as the plan is explained by the testimony of the agency clerk, when the difference in the ages and situation of decedent's children is considered, the testamentary scheme is consistent with natural family affections. Since there is no showing anywhere in the record that decedent experienced mental failure as a result of her sickness, no such failure can be presumed from the testamentary plan on the basis that the plan was inconsistent with decedent's desires.

(5) *The signature.* Comparison of the two handwriting samples offered does show a marked change. The difference is entirely consistent with the testimony of the attending physician and the two subscribing witnesses, and is fully explained by the swollen condition of decedent's hands. The condition of decedent's hands is completely uninstructive on the issue of testamentary capacity sought to be raised on appeal, since considering the record as a whole, there is no showing of mental deterioration corresponding to the progression of the disease which ended decedent's life.

The Administrative Law Judge correctly found decedent to be competent to make a will. The will was properly admitted to probate pursuant to Departmental regulation.[4]

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the order determining heirs issued Apr. 9, 1979, is affirmed.

This decision is final for the Department.

Franklin Arness
Administrative Judge

I concur:

Wm. Philip Horton
Chief Administrative Judge

---

[4] 43 CFR 4.233, implementing the Act of June 25, 1910, 36 Stat. 856, *as amended* (25 U.S.C. § 373 (1976)).

U.S. GOVERNMENT PRINTING OFFICE : 1980 O - 315-706

[illegible]

[illegible]

EDUCTION OF PRODUCTION ROYALTIES BELOW STATUTORY MINIMUM RATES*

I-36920

December 11, 1979

ineral Leasing Act: Royalties

ec. 39 of the Mineral Leasing Act auhorizes the Secretary to reduce the roylty on coal, oil and gas, oil shale, hosphate, sodium, potassium, and sulhur leases in the interest of conservaion whenever in his judgment it is ecessary to do so in order to promote evelopment, or whenever in his judgnent the leases cannot be successfully perated under the terms provided herein.

ineral Leasing Act: Royalties

ec. 39 of the Mineral Leasing Act uthorizes the Secretary to reduce proluction royalties on coal, oil and gas, hosphate, sodium, potassium, and sulhur leases below the statutory minimum ates established for those minerals.

ineral Leasing Act: Royalties—Coal eases and Permits: Royalties

The Federal Coal Leasing Amendments ct of 1975 left in effect the Secretary's uthority under sec. 39 of the Mineral easing Act to reduce production royalies on coal leases below the statutory ninimum rate.

ineral Leasing Act: Generally—Minral Leasing Act: Royalties

The initial terms of any new competitive nineral lease must conform to the statuory minimum production royalty rate hen applicable to that type of mineral ease. Competitive and noncompetitive nineral leases for coal, phosphate, poassium, sodium, and oil shale are subject to periodic readjustment of their terms and conditions. Such readjustments must conform to the statutory minimum production royalty rates then applicable.

Mineral Leasing Act: Generally—Mineral Leasing Act: Royalties

The lease readjustment process and the sec. 39 royalty reduction process may not be merged into a single process where this would result in a readjusted production royalty rate below the applicable statutory minimum. The sec. 39 determination must be made independently.

Mineral Leasing Act: Generally—Coal Leases and Permits: Leases—Coal Leases and Permits: Royalties—Sodium Leases and Permits: Preference Right Leases—Sodium Leases and Permits: Royalties—Potassium Leases and Permits: Leases—Potassium Leases and Permits: Royalties—Phosphate Leases and Permits: Leases—Phosphate Leases and Permits: Royalties

In determining whether a permittee is entitled to a preference right lease the Secretary must consider all legal and economic conditions affecting the proposed operation of the lease as of the time of the determination, including the applicable statutory minimum production royalty rate. A preference right lease must provide for a production royalty rate in conformity with the statutory minimum rate applicable at the time of issuance.

To: SECRETARY.
FROM: SOLICITOR.
SUBJECT: REDUCTION OF PRODUCTION ROYALTIES BELOW STATUTORY MINIMUM RATES.

The minimum production royalty provisions in sec. 6 of the Federal Coal Leasing Amendments Act of 1975, 30 U.S.C. § 207(a) (1976), *as amended*, have focused attention on the Secretary's authority to grant relief from royalty rates in existing and future leases. One of the issues raised is whether or not royalties may be reduced below the prescribed statutory minimum rates. This issue is not limited to coal leases, but arises also with respect to oil and gas and other mineral leases which have minimum production royalty rates prescribed by the Mineral Leasing Act of 1920, *as amended* (the Act).[1]

---

*Not in chronological order.

I have concluded that sec. 39 of the Act, *as amended*, 30 U.S.C. § 209 (1976), permits reduction of production royalty rates below the statutory minimums fixed in other sections of the Act. I have further concluded that any such reduction below the statutory minimum rate may only occur subsequent to the fixing of not less than the minimum rate in the initial terms of the lease itself. On those mineral leases subject to periodic "readjustment," royalties may not be reduced below the prescribed minimums during the readjustment process, but may be reduced thereafter pursuant to sec. 39.

I. Statutory Minimum Production Royalty Rates

A. Coal Leases

The current minimum production royalty rate[2] for coal leases is set out in section 7(a) of the Act, *as amended*, 30 U.S.C. § 207(a) (1976):

> A coal lease * * * shall require payment of a royalty in such amount as the Secretary shall determine of not less than 12½ per centum of the value of coal as defined by regulation, except the Secretary may determine a lesser amount in the case of coal recovered by underground mining operations. * * * Such * * * royalties * * * will be subject to readjustment at the end of * * * twenty years and at the end of each ten-year period thereafter if the lease is extended.

This rate was established by sec. 6 of the Federal Coal Leasing Amendments Act of 1975 (FCLAA). The FCLAA amended sec. 7 of the 1920 Act[3] which had fixed the previous minimum production royalty for coal leases at $.05 per ton.

---

[1] The minerals subject to the Act are listed in sec. 1 of the Act, *as amended*, 30 U.S.C. § 181 (1976). They are coal, phosphate, sodium, potassium, oil and gas, oil shale, native asphalt, solid and semisolid bitumen, and bituminous rock. Sulphur in Louisiana and New Mexico is also subject to leasing although it does not appear in sec. 1, but was added by the Act of Apr. 17, 1926, 44 Stat. 301, 30 U.S.C. §§ 271–276 (1976). The royalty reduction provisions of sec. 39 of the Act, 30 U.S.C. § 209 (1976), cover only coal, phosphate, sodium, potassium, oil and gas, oil shale, and sulphur. It is with this group of minerals that this opinion is concerned.

[2] This opinion discusses minimum *production* royalty rates under the Act. This term should not be confused with so-called "minimum royalties" which are a production incentive assessed against certain nonproducing leases under various sections of the Act, *e.g.*, sec. 10, 30 U.S.C. § 212 (1976) (phosphate); sec. 17, 30 U.S.C. § 226(d) (1976) (oil and gas). The distinction is recognized in sec. 39 of the Act, 30 U.S.C. § 209 (1976), which authorizes the Secretary to "waive, suspend or reduce" the minimum royalty, but only to "reduce" the production royalty, on a mineral lease.

[3] Act of Feb. 25, 1920, c.85, 41 Stat. 439.

B. Oil and Gas Leases

The minimum production royalty rate for competitive oil and gas leases is fixed by sec. 17(b) of the Act, *as amended*, 30 U.S.C. § 226(b) (1976), at not less than 12½ percent of the amount or value of production. This figure has not changed since 1920.

The royalty rate for noncompetitive oil and gas leases is fixed by sec. 17(c) of the Act, *as amended*, 30 U.S.C. § 226(c) (1976), at a flat 12½ percent. This provision was first enacted as sec. 3 of the Act of Aug. 8, 1946, 60 Stat. 951. This rate serves as both a maximum and a minimum for production royalties on oil and gas leases issued for lands not within the known geologic structure of a producing oil or gas field.

In both cases, the 12½ percent rate has produced little controversy over the years. The typical royalty rate included in competitive leases has averaged well above that figure.

C. Other Mineral Leases

Many of the leasable minerals have no minimum production royalty rate provided for by statute. This is true of several of the minerals subject to the Act, including oil shale, asphalt, and competitively leased sulphur.[4]

Most of the minerals subject to the Act are, however, subject to statutory minimum rates. Phosphates are subject to a minimum production royalty rate of 5 percent of the gross value of the lease output.[5] Sodium leases are subject to a 2 percent minimum rate,[6] as are potassium leases.[7] Preference right (noncompetitive) leases of sulphur lands are subject to a 5 percent flat rate on the gross value of the lease output.[8]

These rates, in the case of phosphates and sodium, were established in 1920 by the original Mineral Leasing Act,[9] and in the case of sulphur and potassium, by statutes passed in 1926 and 1927 respectively.[10]

II. Royalty Reduction Provisions

A. Current Law

In 1946 the previous royalty relief and reduction provisions were consolidated and supplemented by the revision of sec. 39 of the Act, *as amended*, 30 U.S.C. § 209 (1976). This section lays out the circumstances and criteria under which the Secretary may proceed to grant relief to a mineral lessee. The section reads in pertinent part:

> The Secretary of the Interior, for the purpose of encouraging the greatest ulti-

---

[4] 43 CFR 3503.3–2(a)(1)(i) does, however, set a minimum rate of 5 percent for competitive sulphur leases by regulation. And 43 CFR 3562.3–6(a) sets a minimum rate of $0.25/ton for certain Oklahoma asphalt leases.

[5] 30 U.S.C. § 212 (1976).

[6] 30 U.S.C. § 262 (1976).

[7] 30 U.S.C. §§ 282, 283 (1976).

[8] 30 U.S.C. § 272 (1976).

[9] Act of Feb. 25, 1920, c. 85, §§ 11, 24, 41 Stat. 440, 447.

[10] Act of Apr. 17, 1926, c. 158, § 2, 44 Stat. 301; Act of Feb. 7, 1927, c. 66, §§ 2, 3, 44 Stat. 1057.

> mate recovery of coal, oil, gas, oil shale, phosphate, sodium, potassium and sulfur, and in the interest of conservation of natural resources, is authorized to waive, suspend, or reduce the rental, or minimum royalty, or reduce the royalty on an entire leasehold, or on any tract or portion thereof segregated for royalty purposes, whenever in his judgment it is necessary to do so in order to promote development, or whenever in his judgment the leases cannot be successfully operated under the terms provided therein.

Of particular interest is the breadth of the Secretary's authority upon his finding of necessity. The provision for waiving, suspending or reducing the rental or minimum royalty[11] indicates that Congress intended sec. 39 to override even explicit dollar figures in the Act. The intended relief with respect to his authority to reduce *production* royalties can hardly be any less broad in view of the explicit purpose of this section to encourage production.

B. Prior Law

(*1*) *Former 30 U.S.C. § 226* (*1940*)

The first royalty relief provision was enacted as part of sec. 17 of the Mineral Leasing Act of 1920.[12] That section, after providing for a minimum production royalty rate of 12½ percent for competitive oil and gas leases, went on to provide:

> Whenever the average daily production of any oil well shall not exceed ten barrels per day, the Secretary of the Interior is authorized to reduce the royalty on future production when in his judgment the wells can not be successfully operated upon the royalty fixed in the lease.

This provision marks the first appearance of the requirement that in order to grant relief the Secretary must find that the wells cannot be otherwise successfully operated. It was, however, a very limited relief provision, applying only to small operations on oil leases. No such limitation appeared in a 1935 amendment to sec. 17 which added the following relief provision for gas leases:

> [I]n the case of leases valuable only for the production of gas the Secretary of the Interior upon showing by the lessee that the lease cannot be successfully operated upon such rental or upon the royalty provided in the lease, may waive, suspend, or reduce such rental or reduce such royalty.[13]

The requirement that the lease be a small production operation was not extended to gas wells. The Secretary was empowered to grant relief to *any* gas lessee upon the lessee's *showing* that he could not otherwise operate successfully. These two relief provisions of sec. 17 were replaced in 1946 with the revision and consolidation of all relief provisions in sec. 39, 30 U.S.C. § 209 (1976).

(*2*) *Former 30 U.S.C. § 209*

The first relief provision of *general* applicability to appear was sec. 39 of the Mineral Leasing Act, enacted in 1933.[14] As enacted, sec.

---

[11] *See* note 2, *supra*.

[12] Act of Feb. 25, 1920, c. 85, § 17, 41 Stat. 443, codified at former 30 U.S.C. § 226 (1940).

[13] Act of Aug. 21, 1935, c. 599, § 1, 49 Stat. 676–677.

[14] Act of Feb. 9, 1933, c. 45, 47 Stat. 798.

39 merely provided for the suspension of acreage *rental* payments when the Secretary, "in the interest of conservation," directed or allowed suspension of coal, oil, or gas lease operations. This provision for relief "in the interest of conservation" has remained as one of the criteria for *royalty* reductions in all subsequent revisions of sec. 39.

In 1946 Congress amended sec. 39 to essentially its present form, combining and consolidating the relief provisions from sec. 17 and sec. 39, and expanding the Secretary's authority.[15] This revision eliminated differing standards for oil wells producing more or less than ten barrels per day, and separate criteria for reducing and suspending rental payments royalties on leases valuable only for the production of gas. For the first time there were also provisions for royalty reductions on coal leases. Specific criteria were established for the granting of all royalty reduction relief. The criteria of "in the interest of conservation" and "whenever * * * the leases cannot be successfully operated" were adopted from the earlier secs. 17 and 39 and made applicable to coal leases, and to all oil and gas leases. To these was added, as an alternative to finding that the lease "cannot be successfully operated," a criterion permitting the Secretary to grant relief, "whenever * * * necessary * * * in order to promote development" consistent with the interests of conservation and encouraging the greatest ultimate recovery. This alternative gave the Secretary greater discretion in granting relief, although still requiring him to find that such relief would be "in the interest of conservation."

A 1948 amendment added oil shale, phosphate, sodium, potassium and sulphur leases to the coal and oil and gas leases covered in 1946.[16] The only subsequent amendment to this section simply stated that the Secretary's authority to waive, suspend or reduce royalties did not extend to advance royalties.[17]

III. Royalty Reduction Below Statutory Minimums

A. Statutory Language

The issue with respect to these statutes is whether Congress intended the royalty reduction authority in sec. 39 to be limited by the provisions establishing minimum production royalty rates. The language of sec. 39 itself does not indicate any such limitation. "The Secretary * * * is authorized to waive, suspend, or reduce the rental, or minimum royalty, or reduce the royalty on an entire leasehold, or on any tract or portion thereof segregated for royalty purposes." This language authorizes the reduction of rentals as well as royalties on mineral leases. Since the rentals for phosphate leases and sodium leases were fixed at a flat rate by statute[18] before the enactment of sec. 39, it is clear that sec. 39 must authorize rental reductions on those leases below the statutory rates. This conclusion about rental reductions under sec. 39 strongly implies that production royalties may similarly be reduced below the prescribed statutory minimum rates.

---

[15] Although Congress initially approached the revision of sec. 39 as a consolidation of existing relief provisions, it actually went on to increase the scope of the Secretary's relief powers. *See United Mfg. Co.*, 65 I.D. 106, 118 n.4 (1958).

[16] Act of June 3, 1948, c. 379, § 7, 62 Stat. 291.

[17] Act of Aug. 4, 1976, P.L. 94-377, § 14, 90 Stat. 1091.

An examination of the history of sec. 39 supports this view. For example, the 1946 royalty reduction provisions of sec. 39 made no distinction between competitive and noncompetitive oil and gas leases. In fact, the section stated: "The provisions of this section shall apply to *all* oil and gas leases issued under this chapter." (Sec. 10 of Act of Aug. 8, 1946, 30 U.S.C. § 209 (1976); italics added.)

Yet the same 1946 amendments to the Act which revised and established sec. 39 also established the fixed 12½ percent royalty rate for noncompetitive oil and gas leases. This can only mean that Congress specifically contemplated the reduction of royalties on noncompetitive leases below the statutory 12½ percent. That such relief was also authorized with respect to competitive leases can scarcely be doubted.

B. Recent Congressional Interpretations

In enacting the Federal Coal Leasing Amendments Act of 1975, Congress echoed this view of sec. 39 with respect to coal royalties. Senator Lee Metcalf, floor manager of S. 391, in discussing the proposed 12½ percent minimum coal royalty rate stated:

> Furthermore, section 39 of the Mineral Leasing Act, as amended, would continue to allow the Secretary to reduce the minimum royalty below 12.5 percent on a tract "for the purpose of encouraging the greatest ultimate recovery of coal." Thus an operator could pay a lesser royalty on that portion of the coal lease which might normally be uneconomical to mine given a 12.5-percent royalty, in the interests of conservation of the resource.
>
> * * * * *
>
> In other words, the flexibility built into the minimum royalty provisions in S. 391 allow [*sic*] the Secretary to encourage maximum recovery of coal while also generating a fair return to the public.[[19]]

Similar language appeared in the June 24, 1976, letter from Senator Metcalf and Congresswoman Mink, the floor manager of the bill in the House, to President Ford urging him to sign the bill into law.[20] In vetoing the bill President Ford, who objected to the "high royalty rate" established by the bill, did not address the applicability of sec. 39 as a relief measure. In the debate over whether to override the veto Congresswoman Mink pointed out:

---

[18] Act of Feb. 25, 1920, c. 85, § 24, 41 Stat. 447, 30 U.S.C. § 262 (1976); Act of Feb. 7, 1927, c. 66, § 3, 44 Stat. 1057, 30 U.S.C. § 283 (1976).

[19] 122 Cong. Rec. 19376 (June 21, 1976).

[20] 122 Cong. Rec. 21357 (June 29, 1976).

> The veto message * * * fails to mention that under section 39 of the Mineral Leasing Act, a section unchanged by S. 391, the Secretary will be authorized to "waive, suspend, or reduce" the minimum royalty for production from both surface and underground mines.[[21]]

And Congressman Roncalio, a member of the Committee that reported the bill, took pains to emphasize that:

> If 12.5 percent is too high for marginal or deep coal * * * the Secretary of the Interior can reduce that 12.5 percent to 7 percent, 5 percent, or 3 percent. He has always had the right to do that. Nothing in this bill takes that highly discretionary right away from the Secretary. He can cut the royalty down to whatever he wishes.[[22]]

Thus, it was the position of the two floor managers of the FCLAA, and of a committee member from a leading federal coal state, that sec. 39 of the Mineral Leasing Act authorized and would continue to authorize royalty reductions below statutory minimum rates at the discretion of the Secretary.[23]

C. Departmental Interpretations

Since the enactment of the amended sec. 39 in 1946, the Department has maintained that the Secretary has the authority to reduce royalties below the statutory minimums. Applications for such reductions have been received and a number of them have been granted. A comprehensive compilation [24] covering the period from July 1, 1957 through June 30, 1977, indicates that during that period 21 applications for royalty reductions on oil and gas leases were granted. Three of these reductions were to a flat rate below the 12½ percent statutory minimum. Two of these were granted in 1957 and the third in 1976. One is still in effect. The other 18 oil and gas royalty reductions were to a 1 percent per barrel per day per well rate, generally resulting in an effective royalty rate well under 12½ percent. Most of these were granted prior to 1965 and are still in effect.

During that same twenty-year period, royalty reductions were granted on other mineral leases as well. Some of these provided for rates below the minimums while others did not. The one sodium lease and 41 potash lease royalty reductions granted during that period did not reduce production royalties below the 2 percent statutory minimum for those minerals. However, all three phosphate lease royalty reductions granted during that time, two of which are still in effect, provided for an effective royalty rate below the 5 percent statutory minimum for phosphate leases.[25] Such reductions pursuant to sec. 39 were known even before the period covered by the 1978 compilation. In a May 31, 1974, memorandum to the Director, Office of Mineral Policy Development, the Assistant Solicitor for Minerals noted: "This is the interpretation of section 39 which has been followed by the Geological Survey and the rest of the Department through the years. This practice was known in 1953." [26]

---

[21] 122 Cong. Rec. 25456 (Aug. 4, 1976).

[22] 122 Cong. Rec. 25459 (Aug. 4, 1976).

[23] Congressman Ruppe, who took the opposing view, apparently based his opinion entirely on an interpretation he had received informally from individuals at the Department of the Interior. 122 Cong. Rec. 25461 (Aug. 4, 1976). This interpretation differed from the Department's position on this issue both before and since that time. *See* Part III.C., *infra*.

[24] Letter from Secretary Andrus to Congressman Runnels, Subcommittee on Mines and Mining (Feb. 27, 1978).

The only deviation from this view appears to have occurred between 1976 [27] and 1979 and seems to have been proposed as a matter of policy. After the enactment of the Federal Coal Leasing Amendments Act of 1975, a revision of the coal leasing regulations was undertaken. While 43 CFR 3503.3-2(d) (1978), which had applied to coal as well as to other leasable minerals except oil and gas, had tracked the language of 30 U.S.C. § 209 (1976) by authorizing the Secretary to "reduce the royalty," the proposed coal regulation added the following reservation: "except that in no case shall a royalty be reduced below 12½ percent for surface mined coal, or 5 percent for underground coal." [28]

This language was drafted, in part, through a misunderstanding of the effect of the FCLAA increase in minimum production royalty rates on the Secretary's sec. 39 authority. Although the Department realized during the drafting process that sec. 39 remained applicable and would continue to support a discretionary reduction below the new minimum rates, the limiting language was allowed to stand in the proposed regulations as a policy decision not to exercise the Secretary's discretion to achieve reductions below those minimum rates. The preamble to the proposed regulations made this clear.[29] After receiving comments on the proposed regulations, the Department decided to return to its former approach to sec. 39, permitting royalty reductions below the statutory minimum rates. The final regulations were revised accordingly. The preamble to the final regulations stated:

> The final rulemaking reinstates the authority of the Secretary to reduce the royalty below the statutory minimum that must be fixed in each lease, in the exercise of his authority under section 39

---

[25] The compilation did not cover applications for reductions in coal royalties under sec. 39 during this period. Very few applications for reductions in coal royalty rates have been received in the past, owing to the low minimum rates in effect prior to passage of the FCLAA in 1976.

[26] Memorandum from Assistant Solicitor—Minerals to Director, Office of Mineral Policy Development (OMPD), "Reduction of Royalties on OCS Oil and Gas Leases" (May 31, 1974). This interpretation of sec. 39 was also discussed in a memorandum from the Assistant Solicitor—Minerals to OMPD dated May 20, 1974, "Reduction of Royalties on OCS Oil and Gas Leases and the Environmental Impact of Profit Sharing Provisions."

[27] *See* note 23, *supra*.

[28] Proposed 43 CFR 3473.3-2(d)(1), 44 FR 16844 (Mar. 19, 1979).

[29] 44 FR 16808 (Mar. 19, 1979).

of the Mineral Leasing Act (30 U.S.C. 209).[30]

The limiting language in the proposed regulation was deleted from 43 CFR 3473.3–2(d)(1) as it was finally adopted. The Department reaffirmed its longstanding interpretation that sec. 39 authorized reductions below the minimum coal royalty rates when necessary. 43 CFR 3503.3–2(d)(1) continues to provide for such royalty reductions for the other leasing act minerals, except oil and gas which are covered by similar language in 43 CFR 3103.3–7.

IV. Timing of Reduction of Royalty Rate Below Statutory Minimum

Having concluded that 30 U.S.C. § 209 (1976) permits the reduction of production royalties below the statutory minimum rates, we turn to the question of when such a reduction may be granted. The question arises in three different leasing situations: new competitive leases; the readjustment of existing leases; and the issuance of preference right leases.

A. New Leases

The terms of any new competitive lease must recognize the statutory minimum rates. The rate established in the initial lease can be no lower than the established minimum. This follows from the mandatory language used by Congress in each of the royalty statutes:

> A coal lease * * * shall require payment of a royalty * * * of not less than 12½ per centum.[31]
>
> * * * * *
>
> [O]il or gas * * * shall be leased * * * [at] such royalty as may be fixed in the lease, which shall be not less than 12½ per centum.[32]
>
> * * * * *
>
> * * * All [phosphate] leases shall be conditioned upon * * * payment * * * of such royalties as may be specified in the lease, * * * at not less than 5 per centum.[33]

Such initial adherence to the statutory minimums is the only way in which such minimums can be effectively applied. The reason the initial lease must prescribe a royalty rate at or above the statutory minimum is in order to make that minimum an effective constraint on the leasing powers of the Secretary as Congress intended. The Secretary can alienate interests in land belonging to the United States only in conformity with the conditions prescribed by Congress. *Union Oil Co. of California* v. *Morton*, 512 F.2d 743, 748 (9th Cir. 1975). Those conditions include the statutory minimum production royalty rates. The Congressional purpose was twofold: first, to insure that the public received a fair return on any initial lease; and second, to insure that mineral leases which could not be operated economically from the outset under minimum conditions would not be issued. This point was made during the debate in Congress at the time the statutory minimum production royalty rate was raised. 122 Cong. Rec. H–158 (daily ed., January 21, 1976). The effect, then, is to encourage the leasing and development of productive mineral lands, while discouraging the uneconomic development of more marginal lands. An initial reduction as an incentive to production is not authorized. *Montana Power Co.*, 72 I.D. 518, 519 (1965).

---

[30] 44 FR 42606 (July 19, 1979).

[31] 30 U.S.C. § 207(a) (1976).

[32] 30 U.S.C. § 226(b) (1976).

[33] 30 U.S.C. § 212 (1976). Similar mandatory language is used with respect to the other Leasing Act Minerals.

In order to carry out these Congressional policies reflected in the minimum production royalty statutes, each lease must conform to the statutory requirements at the outset. Only when difficulties in the conservation and recovery of the leased mineral later occur may a reduction below the minimum rate be justified. This procedure is required by the relief provision itself, and is made particularly clear in light of the original relief provision in the 1920 Mineral Leasing Act. That provision, then sec. 17, authorized the Secretary, when necessary, to "reduce * * * the royalty *fixed in the lease*." (Italic added). This approach, although not this language, is continued under the current Act, which provides for the reduction of royalty "on * * * [the] leasehold." Sec. 39 relief is available only *after* a lease has already been issued in compliance with the statutory royalty requirements.

The policy reason for insisting upon this distinction between the initial royalty terms of a lease and their subsequent reduction was discussed by the Interior Board of Land Appeals in *Kerr-McGee Corp.*, 12 IBLA 348 (1973). In that appeal, a coal mining company seeking a preference right lease petitioned the Department for a reduced royalty rate at issuance of the lease based on difficult mining conditions encountered during the development stage. The Department sought to impose its standard royalty rate for the region, $.20/ton. In rejecting the company's petition the Board pointed out: "[A]ny royalty rate now established commits the Government resources for the next 20-year period." [34]

The Board held that only after issuance of the lease, commencement of production, and a showing of actual necessity under sec. 39 criteria, would a reduction be available. This policy approach protects the interests of the public in receiving a fair return over the life of the lease. In contrast, if a reduction were incorporated in the initial terms of the lease, the Government would be unable later to raise the royalty rates if the circumstances on which the reduction was based were to cease. The holding in *Kerr-McGee* recognized the role of sec. 39 as essentially a relief provision, to be applied to modify the fixed lease terms when, and only so long, as

---

[34] 12 IBLA at 351 (1973).

ecessary.[35] Consequently a reduced
yalty rate below the statutory
inimum will not be granted as an
centive to operations on a new
ase but must be applied for after
e lease terms have been fixed.
uncan Miller, A–30711 (Nov. 16,
66). Based on the statutory lan-
uage and the purposes of the roy-
ty and relief provisions, I con-
ude that a reduction in production
yalty rates below the statutory
inimum may not occur at the
suance of a lease.

. *Lease Readjustment*

Most competitive and noncompet-
ive mineral leases, other than oil
d gas, are issued for a primary
rm of years after which their pro-
sions may be readjusted periodi-
lly.[36] The question of the timing
royalty reductions here arises in
nnection with the Secretary's
wer to "readjust" the provisions
leases upon the expiration of each
ase readjustment period.

With respect to coal leases, 30 U.S.C. § 207(a) (1976) read in pertinent part: "[R]oyalties and other terms and conditions of the lease will be subject to readjustment at the end of its primary term of twenty years and at the end of each ten-year period thereafter if the lease is extended."

A similar "readjustment" is authorized for leases of phosphate, sodium, potassium and oil shale.[37] At the time of readjustment, the Secretary may reduce or raise royalty rates as he determines is appropriate. Reduction of royalty rates at this time, however, cannot be to a rate below the prescribed statutory minimum. The reason for this is that discussed in *Kerr-McGee*, the protection of the Government's royalty interest through the period of the lease. Since the readjusted terms of the lease govern for the length of the ensuing extension period until the next readjustment date, they must be set in accordance with the statute. Moreover, the Secretary must apply the law that is currently in effect in setting the readjusted terms of any lease; he has no authority to readjust a lease contrary to Congress direction regarding lease terms.

---

[35] It should be noted that in *Kerr-McGee*,
e Department had proposed royalty rates
ell above the statutory minimum of $.05/
n, and the company was seeking a reduction
t below the minimum rate. If a reduction
the initial lease terms was not appropriate
der these circumstances, *a fortiori* it would
t be appropriate where the lessee sought an
itial royalty rate *below* the statutory mini-
um rate.

[36] Coal leases issued under sec. 7 of the Act,
U.S.C. § 207 (1970), prior to the FCLAA
re not issued for a "primary period," but
an indeterminate period subject to diligent
velopment and continued operation require-
ents. These leases were issued subject to
adjustment at 20-year intervals. The read-
stment of these leases is intended to be in-
ded in this discussion even though there is
actual renewal of the lease itself associated
th the readjustment.

[37] 30 U.S.C. §§ 212, 262, 283 and 241 (1976), respectively. While the word "readjustment" is not specifically used in connection with sodium leases, it is clear that this is what is meant by "renew for successive periods of ten years *upon such reasonable terms and conditions as may be prescribed by the Secretary,*" 30 U.S.C. § 262 (italics added). *See* 43 CFR § 3522.1–1. No "readjustment" provision exists for oil and gas leases.

It was in part for this reason that the Secretary promulgated 43 CFR 3451.1(a)(2) to require, as they came due, the readjustment of all existing coal leases with royalty rates below the new minimums to conform to the new FCLAA 12½ percent minimum rates. The Deputy Solicitor concluded last year that the minimum production royalty provisions required the Secretary to "place on readjusted leases a royalty of not less than 12½ per centum of the value of [surface mined] coal," and that the sec. 39 relief provisions could only be "subsequently" exercised to grant a reduction below this minimum.[38] The rationale supporting this approach to the readjustmen of coal leases is equally valid for the other leasable minerals subject to readjustment.

Thus, while the Secretary is given some leeway in his readjustment of lease terms under the extension provisions, he must conform his readjustment to the requirement of the then current statutory minimum production royalty rates. Any reduction below such rates must take place pursuant to sec. 39, and independent of the establishment of the readjusted lease terms. The readjustment process and the sec. 39 relief process may not be merged into a single process where this would result in a readjusted rate below the relevant statutory minimum production royalty rate.

C. Preference Right Leases

Certain mineral leases are still granted on a preference right basis. Like new leases and readjusted leases, preference right leases must adhere to the statutory minimum rates in their initial terms. Two reasons exist for treating preference right leases in this way. The first is the *Kerr-McGee* rationale discussed above, to protect the Government's royalty interest over the course of the ensuing lease period.[39] The second is the requirement for issuance of a preference right lease, that the lease applicant have discovered "commercial quantities," [40] or "valuable deposits" [41] of the mineral. No preference right lease may be issued until the applicant has shown that his discovery meets the applicable legal standard. Upon the Secretary's determination that such a showing has been made, the applicant is entitled to the lease as a matter of right. *NRDC* v. *Berklund*, 458 F. Supp. 925, 928 (D.D.C. 1978), *aff'd*, —— F.2d —— (No. 78–1757, D.C. Cir., Nov. 9, 1979). In making this determination, the Secretary must consider all legal and economic conditions affecting the proposed operation of the lease. The Secretary is not limited to considering only those conditions which, at the time of the issuance of the prospecting permit, had been considered in the determination of whether a permittee was entitled to a noncompetitive lease. *Montana Eastern Pipe Line Co.*, 55 I.D. 189, 191 (1935). Neither is his consideration limited to legal and economic requirements as of the date of the lease application. Rather, the Secretary's determination is based upon the law and economic situation as of the date of adjudication of the application. *NRDC* v. *Berklund, supra; Utah International, Inc.* v. *Andrus*, C 77-0225 (D. Utah, June 15, 1979). Thus, the Secretary must apply the current minimum production royalty statutes as part of his evaluation of the applicant's showing of "commercial quantities" or "valuable deposits." A proposed lease operation that is unable to meet the minimum production royalty rates from the outset would not qualify for a preference right lease under either of these standards. A lease will not be granted where it cannot be operated except with royalty relief. The minimum royalty rates must appear in the initial terms of any properly granted preference right lease.

---

[38] Memorandum from Deputy Solicitor to Deputy Under Secretary, "Royalty Terms Upon Readjustment of Coal Leases" (May 2, 1978).

[39] *Kerr-McGee* in fact involved a preference right lease.

[40] 30 U.S.C. § 201(b) (1970) (coal).

[41] 30 U.S.C. § 211(b) (phosphate); 30 U.S.C. § 262 (sodium); 30 U.S.C. § 272 (sulphur); 30 U.S.C. § 282 (potassium).

Thus, any royalty reduction under sec. 39 of the Mineral Leasing Act below the prescribed minimum rates must occur at times other than the setting of the initial or readjusted terms of the mineral lease. This is true whether the initial lease is issued competitively or to a preference right applicant.

V. Conclusion

The royalty reduction provisions of sec. 39 of the Mineral Leasing Act, *as amended* (30 U.S.C. § 209 (1976)), authorize the Secretary to reduce production royalties on mineral leases below the statutory minimum rates set out in other sections of the Act. Thus, reductions below the statutory minimums may be made at the Secretary's discretion in conformance with the requirements of sec. 39. In no case, however, may such reductions be prescribed as a part of the initial or readjusted terms of any lease. The relief afforded by sec. 39 is meant to occur apart from the establishment of the basic lease terms for any given lease period.

FREDERICK N. FERGUSON
DEPUTY SOLICITOR

APPEAL OF THEODORE J. ALMASY ET AL.*

4 ANCAB 151

Decided *February 27, 1980*

Appeal from the Decision of the Bureau of Land Management AA-8103-2, 44 FR 25939 (May 3, 1979).

Affirmed in part.

1. Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Third-Party Interests

Valid existing rights which are protected under § 14(g) of the Alaska Native Claims Settlement Act (ANCSA), 85 Stat. 688, *as amended*, 43 U.S.C. §§ 1601–1628 (1976 and Supp. I 1977) are in all cases derived from and created by the State or Federal Government.

---

*Not in chronological order.

2. Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Third-Party Interests

Sec. 22(b) of ANCSA protects rights of use and occupancy pending patent of land upon which lawful entry was made prior to Aug. 31, 1971, for the purpose of gaining title to a homestead, headquarters site, trade and manufacturing site, or small tract site. Protection under § 22(b) is contingent upon compliance with the appropriate public land law.

3. Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Third-Party Interests

Sec. 22(c) of ANCSA provides limited protection for unpatented mining claims, contingent upon compliance with the specified requirements.

4. Alaska Native Claims Settlement Act: Conveyances: Reconveyances

Sec. 14(c) of ANCSA protects certain land uses based on occupancy alone, by requiring that village corporations receiving lands pursuant to ANCSA reconvey to the occupants those lands occupied for certain specified purposes.

5. Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Third-Party Interests

Where the appellants have not asserted that they have a lease, contract, permit, right-of-way, or easement issued by the Federal Government or by the State of Alaska, they fail to prove entitlement to the protection provided by § 14(g) of ANCSA.

6. Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Third-Party Interests

Where the appellants do not allege entry under, or compliance with, any public land laws, they cannot claim the protection of § 22(b).

7. Alaska Native Claims Settlement Act: Conveyances: Reconveyances

Where the appellants' claimed right to use and occupancy of certain land is based on past use and occupancy of the land, such right might be protected by the reconveyance provisions of § 14(c) if the proposed conveyance were to a village corporation.

8. Alaska Native Claims Settlement Act: Conveyances: Reconveyances

The Board lacks jurisdiction to decide an appeal based on interests claimed pursuant to § 14(c) There is no administrative appeal process available to claimants under § 14(c), and the only recourse is to a judicial forum.

9. Color or Claim of Title: Adverse Possession

Prescriptive rights cannot be obtained against the Federal Government. Except as provided by the Color of Title Act, 45 Stat. 1069, *as amended*, 43 U.S.C. § 1068-1068b (1976), no adverse possession of Government property can affect the title of the United States.

10. Color or Claim of Title: Adverse Possession

The Color of Title Act requires that the claimant have held the subject tract of public land in good faith and in peaceful, adverse possession under claim or color of title for more than 20 years.

11. Color or Claim of Title: Adverse Possession

Under the Color of Title Act, color or claim of title must be based upon a document from a source other than the United States which purports to convey to the applicant the land for which application is made. Possession and improvement of public land by a color of title applicant in the mistaken belief that he owns it is not sufficient basis for conveying title under the Color of Title Act.

. Color or Claim of Title: Good Faith

od faith under the Color of Title Act
quires that the claimant possess the
d without knowing or having reason
know that title to the land was vested
the United States.

**. Color or Claim of Title: Adverse
ssession**

here appellants have not alleged facts
inging their claims within the Color of
tle Act, they are not entitled to land
der that statute.

**. Color or Claim of Title: Adverse
ssession**

clusive possession is required for the
ssession to be adverse.

**. Alaska Native Claims Settlement
ct: Alaska Native Claims Appeal
ard: Appeals: Jurisdiction**

an administrative adjudicative body
ganized to decide appeals under
NCSA, the Board finds all challenges to
e validity of ANCSA beyond its juris-
ction.

**PPEARANCES: Theodore J. Almasy,
o se on behalf of Margaret L. Mes-
lt; Robert C. Babson, Esq., Office of
e Regional Solicitor, on behalf of the
reau of Land Management; Eliza-
th S. Taylor, Esq., on behalf of
yon, Limited.**

OPINION BY ALASKA NATIVE CLAIMS APPEAL BOARD

SUMMARY OF APPEAL

The Bureau of Land Manage-
ent (hereinafter BLM), on Apr.
, 1979, issued the above-refer-
nced decision to issue conveyance of lands to Doyon, Limited (hereinafter Doyon). Theodore J. Almasy, on behalf of himself and Margaret L. Mespelt, entered this appeal claiming all the lands within T. 26 S., R. 22 E., Kateel River meridian, Alaska (unsurveyed) on the basis of use and occupancy (sole occupancy since 1963) and certain unspecified unpatented mining claims. The first question is whether use and occupancy prior to Dec. 18, 1971, other than pursuant to specific statutory authorization, gives rise to any valid existing right in the land on the part of a third party as against a grantee Native corporation. The Board holds that it does not.

JURISDICTION

The Alaska Native Claims Appeal Board, pursuant to delegation of authority in the Alaska Native Claims Settlement Act, 85 Stat. 688, *as amended*, 43 U.S.C. §§ 1601–1628 (1976 and Supp. I 1977) (hereinafter ANCSA), and the implementing regulations in 43 CFR Part 2650 and 43 CFR Part 4, Subpart J, hereby makes the following findings, conclusions, and decision.

PROCEDURAL BACKGROUND

On Apr. 30, 1979, the BLM issued its above-referenced decision to convey, *inter alia*, all of T. 26 S., R. 22 E., Kateel River meridian, Alaska (unsurveyed) to Doyon, Limited.

On June 8, 1979, the appellants filed with the Board a letter protesting and appealing the decision of the BLM insofar as it failed to exclude T. 26 S., R. 22 E., Kateel River meridan, from the proposed conveyance. Appellants claimed such township in its entirety under "Aboriginal Title" and pursuant to "Use and Occupancy." Moreover, appellants alleged occupation of the specified township for a period "far in excess of the ten (10) year Statute of Limitations on Adverse Claims against the United States and the so-called State of Alaska, and have been the sole occupants since March 1963."

Appellants also asserted the illegality and unconstitutionality, on grounds, of ANCSA.

The Board, by Order dated June 22, 1979, stated it considered appellants' letter to be a Notice of Appeal and Statement of Reasons and Interest Affected, and ordered the filing of any answers within 30 days of the date of the Order.

The BLM then filed its "Response to Appellants' Statement of Reasons and Motion to Dismiss." The BLM interpreted appellants' appeal only as an attack upon the constitutionality of ANCSA rather than as alleging violations by the BLM of the substantive provisions of ANCSA or of any other statute of the United States. Accordingly, the BLM argued the appeal to be beyond the subject matter of the Board, and moved for dismissal.

Doyon then filed its "Response to Appellants' Statement of Reasons and BLM's Motion to Dismiss." Taking issue with BLM's interpretation of the appeal, Doyon on page 3 declared "the basic thrust of Appellants' appeal is that they have acquired property rights in the township in question which prevents its conveyance to Doyon." Continuing, Doyon stated:

> Whether Appellants' claims are valid existing rights, and whether the DIC's in question adequately recognize these rights or whether the DIC's attempt to convey to Doyon lands or interests in lands which are owned by Appellants are questions which are certainly within the Board's jurisdiction, and which must be determined prior to interim conveyance to Doyon.

Response, page 3.

Insofar as appellants had asserted ownership of unpatented mining claims, Doyon incorporated by reference Section V of its Memorandum in Support of Statement of Reasons filed in *Appeal of Doyon, Limited*, ANCAB VLS 79–15. Said section argued that BLM should identify and adjudicate unpatented mining claims on the subject property.

Appellant, Theodore J. Almasy, subsequently submitted a letter, the express intent of which was to amend, supplement, and/or clarify information previously presented. The letter reiterated appellants' claim to the subject land on the basis of "use and occupancy," and further declared such to be the "legal basis under which unpatented mining claims are held and maintained under the 'Rules' of the U.S. Mining Law of 1872."

DECISION

The issue central to this appeal is whether the appellants have asserted any interest, in lands affected by the decision appealed, which is protected under ANCSA. The question is whether use and occupancy prior to Dec. 18, 1971, other than pursuant to specific statutory authorization, gives rise to any valid existing right in the land on the part of a third party as against a grantee Native corporation.

[1] Sec. 14(g) of ANCSA renders all conveyances made pursuant to ANCSA subject to valid existing rights. Valid existing rights protected under § 14(g) are, in all cases, derived from and created by the State or Federal Government. *Appeals of State of Alaska and Seldovia Native Association, Inc.*, 2 ANCAB 1, 84 I.D. 349, 369–370 (1977) [VLS 75-14/15]. Accordingly, the illustrative list of valid existing rights in § 14(g) of ANCSA is of rights "issued" by the State of Alaska or the United States.

[2] Sec. 22(b) protects rights of use and occupancy pending patent of land upon which lawful entry was made prior to Aug. 31, 1971, for the specified purposes of gaining title to homesteads, headquarters sites, trade and manufacturing sites, or small tract sites. Protection under § 22(b) is contingent upon compliance with the appropriate public land law.

[3] ANCSA also addresses the rights of mining claimants. Sec. 22 (c), which provides limited protection for unpatented mining claims, requires that any claim or location for which protection is sought have been initiated under the general mining laws prior to Aug. 31, 1971, that it be valid, and that notice of the claim or location be recorded with the appropriate State or local office. Lack of compliance with the foregoing requirements renders § 22 (c) inapplicable to the subject claim or location, and leaves the claimant or locator without protection under ANCSA.

[4] Finally, § 14(c) of ANCSA protects certain land uses based on occupancy alone, without requiring a claim of title or of a lesser interest derived from contract entry under the public land laws, or other authorization. Sec. 14(c) requires that village corporations receiving lands pursuant to ANCSA reconvey to the occupants those lands occupied as a primary place of residence or business, as a subsistence campsite, or as headquarters for reindeer husbandry. Village corporations are also required to reconvey to the occupants lands occupied by nonprofit corporations.

[5] The appellants have not asserted that they have a lease, contract, permit, right-of-way, or easement issued by the Federal Government or by the State of Alaska, and thus have failed to prove entitlement to the protection for such valid existing rights provided by § 14(g).

[6] Similarly, the appellants do not allege entry under, or compli-

ance with, any public land laws. The interests they claim are thus not within the protection offered by § 22(b).

[7] The appellants' claimed right to use and occupancy of certain land might be protected, at least as to tracts of a limited size, by the reconveyance provisions of § 14(c) if the proposed conveyance were to a village corporation. The decision here appealed, however, approves conveyance to a regional corporation of lands selected pursuant to § 12(c) of ANCSA. While the Board cannot foresee any circumstance in which claims based on § 14(c) of ANCSA could be asserted against a regional corporation, the Board does not rule on the point at this time.

[8] In any case, the Board lacks jurisdiction to decide an appeal based on interests claimed pursuant to § 14(c). Appeals involving § 14(c) interests are premature when brought prior to conveyance of the land to the appropriate Native corporation, because until the corporation has received conveyance and has in some manner refused reconveyance to a claimant, no dispute exists to be adjudicated. Following conveyance to the Native corporation, when such a dispute may arise, the Department, including this Board, has no jurisdiction over issues involving patented land. Thus, there is no administrative appeal process available to claimants under § 14(c), and the only recourse is to a judicial forum. *Appeal of James W. Lee*, 3 ANCAB 334, 343 (1979) [VLS 79–11]. Accordingly, this Board does not rule on any rights to reconveyance which the appellants might have under § 14(c), and this decision in no way prejudices such rights.

[9] Appellants claim rights in the subject lands pursuant to exclusive and adverse use and occupancy for a period "far in excess of the ten (10) year statute of limitations on adverse claims against the United States and the so-called State of Alaska * * *." It is a well established doctrine that prescriptive rights cannot be obtained against the Federal Government. *Appeal of Sam E. McDowell, et al.*, 2 ANCAB 350, 355 (1978) [VLS 78–2]; *Manley Rustin and Betty Rustin*, 28 IBLA 205, 208 (1976). Generally, one may not acquire title to Government land, or to any part of the public domain, by adverse possession. Except as provided by the Color of Title Act, 45 Stat. 1069, *as amended*, 43 U.S.C. § 1068–1968b (1970), no adverse possession of any governmental property can affect the title of the United States. 2 C.J.S. *Adverse Possession* §§ 10, 13, 14.

[10, 11, 12] The Color of Title Act (hereinafter Act), at 43 U.S.C. § 1068, requires that the claimant have held the subject tract of public land in good faith and in peaceful, adverse possession under claim or color of title for more than 20 years. Under the Act, color or claim of title must be based upon a document from a source other than the United States, which document on its face purports to convey to the applicant the land for which application is made. *Marie Lombardo*, 37 IBLA 247, 248 (1978); *Manley Rustin and Betty Rustin, supra.* The possession and improvement of public land by a color of title applicant in the mistaken belief that he owns it is not a sufficient basis for conveying land under the Color of Title Act. *Frank W. Sharp*, 35 IBLA 257, 260 (1978). Furthermore, good faith under the Act requires that the claimant possess the land without knowing or having reason to know that title to the land was vested in theUnited States. *Joe Stewart*, 33 IBLA 225, 229 (1977). Good faith requires an honest belief by claimant that the land was owned by him, and the Department may consider whether such belief was unreasonable in the light of the facts then actually known to him. *Lawrence E. Willmorth*, 32 IBLA 378, 381 (1977).

[13, 14] The appellants have not alleged facts bringing them and their claims within the purview of the Color of Title Act. Thus, they are not entitled to receive title to land under that statute. While they deny United States ownership of the land, appellants have been aware from the time of their entry of the government's claim of ownership. Appellants' claim of ownership is based on a mistake of law rather than on a chain of title found defective. Furthermore, claimants claim exclusive possession for less than 20 years. Exclusive possession is required for the possession to be adverse. *Lawrence E. Willmorth*, *supra* at 382. Thus, appellants have not possessed the land adversely for the requisite period. It might also be noted that the Act authorizes issuance of patent to no more than 160 acres to each qualified claimant. Such acreage is a minute fraction of that claimed by the appellants here.

The appellants assert that ANCSA is unconstitutional.

[15] As an administrative adjudicative body organized to decide appeals under ANCSA, the Board must rule that all challenges to the validity of ANCSA are beyond its jurisdiction. *Appeal of Clifford C. Burglin*, 3 ANCAB 37, 46 (1978) [OG 77-4].

In claiming rights pursuant to "use and occupancy," appellants do not allege compliance with the law and regulations relating to unpatented mining claims. Nonetheless, appellants do allege ownership of numerous unpatented mining claims within the subject township. While rejecting appellants' arguments regarding rights based on use and occupancy, the Board recognizes the possibility that appellants possess valid unpatented mining claims for which protection is accorded by ANCSA.

ORDER

The Board hereby rejects appellants' arguments regarding claims based on mere use and occupancy of the subject lands, on prescriptive rights against the United States, and on the alleged invalidity of ANCSA.

The Board reserves for future consideration the issues raised by the allegation of appellants' ownership of unpatented mining claims. Appellants are hereby Ordered to file with the Board, and to serve upon the other parties to this appeal, within thirty (30) days of the date of this Order, a listing of all unpatented mining claims located in T. 26 S., R. 22 E., Kateel River meridian, Alaska, and claimed by the appellants. Each claim is to be identified by the reference number under which it is filed pursuant to the Federal Land Policy and Management Act of 1976.

This represents a unanimous decision of the Board.

JUDITH M. BRADY
Administrative Judge

ABIGAIL F. DUNNING
Administrative Judge

JOSEPH A. BALDWIN
Administrative Judge

APPEAL OF WASHINGTON UNIVERSITY

IBCA-1228-11-78

Decided *March 4, 1980*

Contract No. 68-01-2471, Environmental Protection Agency.

Denied.

Contracts: Construction and Operation: Allowable Costs—Contracts: Construction and Operation: Contract Clauses

Where a contractor is found to have failed to maintain a system of cost records as required in the cost reimbursable contract, an affidavit of the contractor's project director prepared 5 years later is found to be insufficient evidence that unsupported retroactive cost transfers to the contract were costs actually incurred in performance of the contract.

APPEARANCES: Mr. Peter H. Ruger, General Counsel, Washington University, St. Louis, Missouri, for appellant; Mr. Keith L. Baker, Government Counsel, Washington, D.C., for the Government.

OPINION BY ADMINISTRATIVE JUDGE LYNCH

INTERIOR BOARD OF CONTRACT APPEALS

This appeal is from the disallowance of $8,247 in costs associated with salary and wage transfers under a cost reimbursement contract. The appeal is submitted on the record.

Background

Appellant is a private university engaged in numerous research projects under its own sponsorship as well as Federal grants and contracts. The instant contract for $124,930, awarded on June 20, 1974, called for one year of effort to produce a research report on testing the reliability with which the bacterial Mutagenic Technique can distinguish between carcinogenic and noncarcinogenic synthetic organic chemicals. The contract was performed and the report delivered.

The Contracting Officer disallowed the amount in dispute because the salary costs and associated burdens and fringes were incurred in July and August of 1974 and charged to other contracts and a grant and were transferred to the instant contract in Dec. 1974 without sufficient documentation. An audit report dated Nov. 14, 1977 (AF–12).[1] contained recommendations for adjustment, including the costs disallowed. The report refers to a prior audit for the 4-year period ending June 30, 1975 (AF–13), which included the period of performance of the subject contract. The latter audit report found certain deficiencies in appellant's accounting system including the charging of salaries to projects on the basis of budget estimates rather than on the basis of the actual effort expended and a common practice of payroll transfers without sufficient review and justification.

The 4-year audit report found that during fiscal year 1975, when the instant contract was performed, there were 102 questionable transfers totalling $358,611, with about 68 percent of the adjustments transferring costs out of departmental accounts into Federal grants or contracts. The audit stated an opinion that a significant number of the transfers were made for the convenience of the various departments. A basic criticism of appellant's accounting system was the failure to comply with Federal Management Circular (FMC) 73–8.

Appellant argues that the costs should be allowed because:

1. The contract contained no express provision concerning applicable cost accounting standards for educational institutions.

2. The contract was fully and satisfactorily performed and the Government has not presented any evidence to indicate that the persons named in the salary transfers did not actually perform work on the contract.

3. The salary transfers were not made near the end of the contract performance period as had been others transfers complained of by the auditors.

4. There is ample after-the-fact justification to show that the compensation sought is reasonable and necessary for performance of the contract and the basic purpose of audits to permit contractors to correct deficiencies in the future has been ignored by the Government.

5. By affidavit dated May 1, 1979, appellant's project director affirmed that to the best of his recollection he had, in conformance with the then prevailing practice, verbally requested office personnel in June 1974 to effect the salary transfers to reflect actual changes in effort on the contract, and then again requested the transfer be made in Dec. 1974 upon learning his verbal instructions had not been carried out.

The Government contends that (1) the claimed costs are not allowable pursuant to Clause 18 of the contract which incorporates Subpart 1-15.3 of the Federal Procurement Regulations as applicable cost accounting standards which were not met, (2) the contractor has not presented evidence sufficient to sustain the burden of proving the costs were actually incurred in performance of the contract, and (3) that $802.75 of the claimed costs could not be allowed because this amount is related to the salary of a key person transferred without the required prior approval of the Government.

---

[1] All references are to appeal file documents.

Clause 18, "Allowable Cost and Payment" (AF-14), contains the following pertinent provisions:

> (a) For the performance of this contract, the Government shall pay to the Contractor the cost thereof [hereinafter referred to as "allowable cost"] determined by the Contracting Officer to be allowable in accordance with:
>
> (1) Subpart 1-15.3 of the Federal Procurement Regulations as in effect on the date of this contract * * *; and
>
> (2) The terms of this contract.

Clause 23, "Audit and Records" provides:

> (a) The Contractor shall maintain books, records, documents, and other evidence and accounting procedures and practices, sufficient to reflect properly all direct and indirect costs of whatever nature claimed to have been incurred and anticipated to be incurred for the performance of this contract. The foregoing constitute "records" for the purposes of this clause.

Article XIII, "Identification of Key Personnel and Notification of Change" provides:

> It is recognized by the parties that in order to maintain a successful program, the Contractor must assign highly capable and qualified personnel. Therefore, the Contractor agrees to notify the Contracting Officer of changes in the Contractor's assignments of key personnel listed below. Such notification shall be given within a reasonable time prior to its implementation and shall require approval by the Contracting Officer.
>
> Prof. Barry Commoner

Discussion and Findings

First it is appropriate to address appellant's contention that the contract contained no express provision concerning applicable cost accounting standards. Appellant correctly states that the notation, "Not applicable to educational institutions" is typed beside paragraph 15 of the Special Instruction to offerors. This paragraph relates to cost accounting practices under contracts subject to the requirements of the Cost Accounting Standards Board. In subparagraph d, contracts with educational institutions subject to FPR 1-15.3 (41 CFR 1-15.3) are excepted from such requirements. However, the above quoted portion of Clause 18 of the contract clearly provides for allowable costs to be determined by the Contracting Officer in accordance with FPR 1-15.3. Regarding payroll systems of educational institutions, FPR 1-15.309-7(d) states that:

> [I]nstitutional payroll systems must be supported by either (1) an adequate appointment and workload distribution system accompanied by monthly reviews performed by responsible officials and a reporting of any significant changes in workload distribution of each professor

> **or professional staff member, or (2) a monthly after-the-fact certification system which will require the individual investigators, deans, departmental chairmen, or supervisors having firsthand knowledge of the services performed on each research agreement to report the distribution of effort.**

Therefore, we find that the contract did contain express provisions concerning applicable cost standards.

The second contention of appellant is that the contract was fully and satisfactorily completed and the Government offered no evidence that the persons involved in the salary transfers did not work on the contract. The satisfactory completion of a cost reimbursable contract is not a determining factor for allowance of costs, unless it can be shown that the costs were actually incurred by the contractor and are otherwise allowable. Had fortuitous circumstances permitted the contract to be fully performed with the expenditure of only 50 percent of the estimated cost, the contractor has no claim for any cost above those actually incurred. Conversely, a cost reimbursable contractor has no obligation to complete the contract work when the estimated costs have been exceeded. Therefore, the satisfactory completion of the contract work is not relevant to the issue of entitlement to the total estimated costs. The second part of appellant's argument seeks a reversal of roles between the contractor and the Government. It is the contractor's responsibility to maintain records in compliance with the contract requirements which show that the persons involved in the salary transfers did actually work on the contract. Except for the affidavit of Dr. Commoner, which will be discussed below, the Government's examination of appellant's records could not verify whether the persons involved worked on the contract. The contract agreement is for the contractor to keep adequate cost records to show incurred costs. The Government does not agree to keep records of the contractor's expenditures, so that proof that the persons did not work on the contract would not normally exist. What is important is that the contractor's burden of keeping the records of actual costs incurred carries with it the burden of proving by adequate records that the involved persons' salaries were a part of the actual cost. Appellant's third contention is that the salary transfers did not occur near the end of the contract performance period. Again, appellant does not perceive its obligations correctly. The transfer of cost to a contract close to the end of the contract performance may cause concern and closer scrutiny of the transfer by the auditors. However, the disallowance of salary transfers is based on insufficient documentation, and not on the time the transfers occurred. In this appeal, we are concerned only with the question of whether the contractor's records are sufficient to show that the disputed costs were incurred in performance of the contract.

Appellant has not offered the evidence necessary to support the fourth argument respecting the reasonableness and necessity of the compensation sought in performances of the contract (the total estimated cost) and the purpose of audits. Regarding the amount of compensation sought, our discussion above should suffice to show that reasonableness of the compensation sought by appellant is not determinative. The necessity of expenditures must be measured against the adequacy of appellant's records showing the actual costs and the allowability of the costs under the contract standards. Absent any proof offered in support of the reasonableness and allowability of the disallowed salary transfers, we must reject this argument. The argument that audits have the basic purpose of permitting future improvements to correct present deficiencies must fail for want of proof. We must and do take notice of the many audits performed for the express purpose of determining the actual costs expended in performance of a contract or the actual costs expended in the performance of a change in the contract work. Appellant's position suggests that an audit of a cost reimbursable contractor will not be used to penalize for failure to keep adequate records. The fallacy of this position is demonstrated in the myriad of cases to the contrary.

The last argument of appellant is that the salary transfers were not timely accomplished because of a breakdown in the then existing system of verbal orders for the transfers. The affidavit of Dr. Commoner (Exh. A) dated May 1, 1979, is offered to show that the error was corrected upon discovery some 5 to 6 months later. There was considerable delay in settling the record in this case while appellant's counsel secured this affidavit from the very busy and unavailable Dr. Commoner. A dispute arose between the parties over the weight to be given the affidavit as compared with testimony given on deposition. The Board denied additional time for appellant to secure the deposition of Dr. Commoner, and in this instance, accords the same weight to the affidavit.

According to his affidavit, Dr. Commoner, director of the contract effort, verbally ordered the transfer of four persons to the contract work in June of 1974. This action was taken because one of the principal investigators would be absent on vacation. The order was not carried out and upon a review of the contract cost records in December, Dr. Commoner again directed the transfers be made. On this occasion, the records were changed to show the transfers. The affidavit is the specific evidence relied on by appellant in support of the claim for the disallowed costs. Appellant has not offered affidavits of any of the persons involved in the salary transfers attesting to their work on the contract. Neither has appellant alleged that any or all of the persons involved are no longer employed at the university or are unavailable. Such affidavits would be more credible than that of a busy director recalling individual transfers on a single contract occurring 5 years earlier. The involved individuals would be more likely to recall their work experience or to have noted it on their resumes of experience. Dr. Commoner's affidavit is based entirely on his recollection of events 5 years past and no reference is made to any notes or memoranda in aid of his memory.

The basic issue presented by the Government's disallowance of the salary transfers is whether there is sufficient evidence that the costs were incurred in performance of the contract. Other than the disputed costs, the auditors found that no opinion could be expressed respecting allowability of an additional $76,346 in claimed costs because of weaknesses in the appellant's payroll certification system. The contract required (FPR 1-15.309-7 (d)) timely monthly reviews or cer- ifications by responsible knowl- dgeable officials of the workload listribution. The auditors inter- iewed several of the responsible departmental officials and found that nany were unaware of the signifi- ance of the certification process. The audit revealed many instances of certifying the monthly reports of orkload distribution on the basis f initial budgeted amounts. They ound the certifications were un- imely made months after the re- orting period and frequent after- he-fact transfers of salary charges ithout regard to the initial cer- fications. The transfers were freely ade by the accounting office upon equest by a department without upporting justification.

Appellant's reply to the audit does not contest the existence of the practices found by the auditors. Instead, it attempts to justify the accounting practices by reference to the guidelines in the DHEW Grants Administration Manual, previous favorable audit reports by other agencies, and the absence of guidelines in any grants instruction dealing with salary transfers.

Appellant mistakenly relies on the less stringent accounting requirements that may apply to grants and was apparently unaware that different requirements were expressed in its contracts. It failed to distinguish between contracts, grants, and university sponsored projects and freely permitted retroactive unexplained adjustments of charged salary costs between projects. As a result, appellant's practices denies knowledge of actual costs of any project to itself as well as the Government.

We find that appellant failed to maintain the contract cost records as required by the contract. The cost records that were maintained do not show that the disputed costs were actually incurred in performance of the contract. The absence of a contemporaneous justification of the tardy salary transfers cannot be overcome solely by an affidavit 5 years later by the project director relying totally on his recollection. There is no evidence in the record other than the affidavit to show that the transferred salary costs were incurred in performance of the contract.

We find that the appellant has failed to prove his claim and the appeal is denied.[2]

Russell C. Lynch
Administrative Judge

I concur:

William F. McGraw
Chief Administrative Judge

APPEALS OF GREGORY LUMBER CO.

IBCA-1237-12-78,

1238-12-78
1239-12-78
1240-12-78

Decided *March 11, 1980*

Contract Nos. OR090-TS7-8 (Poddle Creek),
36090-TS5-49 (Fish Creek),
OR090-TS6-18 (Salmon Creek),
OR090-TS6-60 (Rat Creek),
Bureau of Land Management.

Motion to dismiss granted.

1. Contracts: Construction and Operation: Intent of Parties—Contracts: Contract Disputes Act of 1978: Jurisdiction

Where the contracting officer responds to appellants general inquiry on a number of pending claims, the Board finds that response is not a new appealable decision occurring after the effective date of the Contract Disputes Act of 1978 with regard to four appeals previously dismissed for lack of jurisdiction and then pending before the Board on appellant's motion for reconsideration.

APPEARANCES: Mr. Edward F. Canfield, Attorney at Law, Casey, Scott & Canfield, Washington, D.C., for appellant; Messrs. Lawrence E. Cox and Donald P. Lawton, Department Counsel, Portland, Oregon, for the Government.

OPINION BY ADMINISTRATIVE JUDGE LYNCH

INTERIOR BOARD OF CONTRACT APPEALS

Motion to Dismiss

The Government has filed a motion to dismiss the above-captioned appeals on the grounds that there is no appealable contracting officer decision within the jurisdiction of this Board.

Background

The above-captioned appeals were dismissed by the Board in an opinion dated Sept. 28, 1979, because the Board lacked jurisdiction. None of the four contracts involved contained a disputes clause and the final decisions of the contracting officer were made prior to the effective date of the Contract Disputes Act of 1978 (P.L. 95-563). The principal decision of the Board found that none of the claims had been pending before the contracting officer on Mar. 1, 1979, the effective date of the Act, and that the lack of pendancy gave the Board no jurisdiction over the appeals.

---

[2] Cases cited in the briefs are not discussed because the issue presented here of retroactive unsupported transfers of costs was not an issue in the referenced cases. Also, some of the cases cited relate to other types of contracts and to issues not present in this case.

Appellant filed a motion for reconsideration, and by decision dated Nov. 23, 1979, the Board reaffirmed the principal decision. On Nov. 28, 1979, appellant filed a new notice of appeal in these appeals on the grounds that the contracting officer had reconsidered the claims during the period from June 19 to Nov. 6, 1979, and that the appeals were pending before the contracting officer after the effective date of the Act to permit the Board to take jurisdiction of the appeals. The Government filed a motion to dismiss dated Feb. 1, 1980. By order dated Feb. 12, 1980, the Board required appellant to respond to the motion to dismiss and to support its request for a hearing by Mar. 7, 1980. Appellant's memorandum in support of its request for a hearing was filed with the Board on Mar. 5, 1980, and its response to the motion to dismiss on Mar. 7, 1980.

In the new notice of appeal dated Nov. 28, 1979, appellant urges that an exchange of correspondence initiated with the contracting officer by appellant on June 19, 1979, constituted a reconsideration of the dismissed appeals and a new adverse decision by the contracting officer. Appellant argues that this exchange of correspondence after the effective date of the Act affords jurisdiction to the Board. None of the documents relied on were furnished to the Board prior to issuance of the decision on reconsideration. By letter dated June 19, 1979, appellant forwarded to the contracting officer a report dated Apr. 26, 1979, prepared by Jackson & Prochnau, Inc., consulting forest engineers. Appellant's transmittal letter characterized the Prochnau report as relevant to the issue of claimed shortages of timber available to appellant on 12 contracts (including the four under which appeals had been dismissed) for the purchase of timber on Government land. By letter dated Sept. 28, 1979 (referring only to one contract with a pending claim), the District Manager of the Eugene, Oregon, office of the Bureau of Land Management responded giving the results of reviewing the Prochnau report, and again denied appellant's request for relief. He advised appellant of the reasons it considered the Prochnau report to be in error in its conclusion that there should only be small differences between timber recovery under the Bureau scaling standards and those of the Columbia River Scaling Bureau.

In a letter dated Oct. 9, 1979, appellant referenced only seven of its contracts (including the ones under which appeals had been dismissed). The letter stated:

> We appreciate your letter of September 28, 1979, concerning the Simonsen Road tract.
>
> You asserted in that letter that the Prochnau Report erred in its conclusion that substantial differences exist between BLM's method of scaling and other methods.

> You may note that the Prochnau report was forwarded to you for your consideration because of our belief that as expert opinion it impacts on the other Gregory timber sale contract claims. Are we to infer that your comments about the Prochnau Report apply also to the other Gregory claims in the same manner you applied it to Simonsen Road?

The District Manager responded by letter dated Nov. 6, 1979, referencing only the Simonsen Road contract. He advised that the statement attributed to him was incorrect and that the Prochnau report claims that substantial differences *do not* exist between the two scaling methods (underscoring was used in the letter). He concluded with the following: "Essentially our disagreement with the Prochnau report involves basic mensurational principles. Therefore, we must answer the question raised in the last sentence of your letter in the affirmative."

The above exchange of correspondence is the basis for the claim that the contracting officer rendered a new adverse decision on the dismissed appeals.

Discussion and Findings

Appellant's memorandum in support of the hearing request recites a number of differences or issues raised by the Government's motion to dismiss to indicate there exists factual issues between the parties that require testimony of witnesses in a hearing to resolve. Admitting at the outset that the documents are determinative of appellant's right to appeal, appellant treats the arguments made by counsel for the Government as adding facts requiring resolution by testimony of witnesses. The factual issues confronting this Board are those that are inherent in the actions of the parties and, whether correctly perceived by the parties themselves, the factual differences cannot be enlarged by the arguments of opposing counsel. Appellant proposes witnesses to testify concerning the reason, and motivation for the actions forming the factual basis for the appeals. Absent fraud, which is not alleged, the actions of the parties are represented in a few documents or exchanges of correspondence. Unless given good cause to inquire into the motivation of a participant to a dispute, the undisputed recorded actions of the parties are evidentiary values for the Board to consider. Whether motivated by pressures from superiors, an excess of zeal or by other factors, it is the recorded actions of a responsible official or officials of either party that determines whether the contractual rights and obligations of the parties have been altered. The documents on which these new appeals are based have been provided by the parties. The documents speak for themselves.

The Board finds that the documentary evidence submitted by the parties to be sufficient to resolve the issue of whether the appeals are properly before this Board. The documents themselves have not been challenged so that the value of a hearing would necessarily be limited to testimony regarding the correct interpretation of the documents. We consider the interpretation of the documents to be a question to be resolved by the Board, aided by the arguments of both counsel; but we find that the testimony of witnesses concerning issues of motivation that are not in issue are not relevant to our deliberations. Therefore, we deny appellant's request for a hearing.[1]

The central issue involved in hese appeals is whether the conracting officer rendered a new deision in the instant cases which is ppealable to this Board. Appelant's letter of Sept. 28, 1979, does sk that the position of the Bureau oncerning the referenced contracts considered in light of the Prochau report. The District Manager's sponse dealt only with the pendg appeal on the Simonsen Road ntract claim in denying the relief quested. The response went further to point out the shortcomings the Prochnau report which was d to have been carefully studied fore reaching a decision on the im involving the Simonsen Road ntract. The District Manager did refer to any other specific claim. referred to prior responses to ims of appellant to reiterate the ition taken in denying the ims, which was that the purchase e is not contingent upon the ume of timber recovered by the chaser. Clearly, he did not dis- appellant's request that the ernment position on all the ns be reconsidered in the light of the Prochnau report, but rather reiterated the position consistently taken by the Government. Appellant recognized the District Manager had limited his consideration to the Simonsen Road contract in the opening sentence of the Oct. 9, 1979, letter and asked whether his comments on the Prochnau report could be inferred to apply to the other Gregory claims. The Government response was that the Government position respecting the Prochnau report had been misstated and that the question raised must be answered in the affirmative.

It is significant that the Prochnau report relates to the results of using different scaling methods to determine the amount of recovered timber. The Government has consistently taken the position on appellant's claims that the amount of timber recovered by them is not relevant to the lump-sum purchase price. Therefore, its review and response pertaining to the Prochnau report related to an issue that had not been considered relevant and continued to be considered to have no relevance to the Government's position.

Having recognized that the Government response to the Prochnau report was limited to the Simonsen Road contract, appellant's claim that there was reconsideration and a new decision by the contracting officer must rest on the final paragraph of the District Manager letter of Nov. 6, 1979. The subject of that letter is "Simonsen Road Timber Sale Contract 0R090-TS60-81."

---

[1] he right to a hearing is not absolute. *See on-Cheves Construction Co.*, IBCA No. -67 (Oct. 8, 1968), 68-2-BCA 7289.

The concluding paragraph states a disagreement with the Prochnau report involving basis mensurational principles and affirms that such disagreement would apply equally to the other Gregory claims. It appears that if the Government disagreed with the conclusions of the Prochnau report as to the differences that would result from applying different standards of measurement, it would be incongruous to expect that the same reviewers would reverse that opinion to consider the report's conclusions to be valid on other similar claims. Therefore, appellant was asking a question that required no answer beyond that already given unless the question was asked for another purpose, *i.e.*, to attempt to breathe life into the dismissed appeals.

Assuming, *arguendo*, that the District Manager's response in final paragraph of the Nov. 6, 1979, letter was a direct response to "the other Gregory claims" referred to in appellant's letter of Oct. 9, 1979, the above-captioned appeals had been dismissed by this Board on Sept. 28, 1979. By letter dated Oct. 26, 1979, appellant requested reconsideration of the decision dismissing the appeals. The instant appeals were therefore pending before the Board on the date of the District Manager's letter of Nov. 6, 1979, and were not claims pending before the contracting officer (*see* principal decision). Consequently, the contracting officer's response could only relate to claims pending before him, and not the instant appeals then pending before the Board.

We find nothing in the correspondence indicating any intent to reconsider or actual reconsideration of the instant appeals by the contracting officer. At best, appellant's claim of a new contracting officer's decision rests on the fact that he may have inadvertently rendered a new decision by responding to a question requiring no answer beyond that already given. We find that the contracting officer did not reconsider the claims involved in the instant appeals and render a new decision thereon. The Government's motion to dismiss is granted. The appeals are dismissed with prejudice.[2]

Russell C. Lynch
Administrative Judge

I concur:

William F. McGraw
Chief Administrative Judge

ESTATE OF JOHN JOSEPH KIPP

8 IBIA 30

Decided *March 14, 1980*

Appeal from order by Administrative Law Judge David J. McKee denying petition for rehearing.

Above order affirmed; order determining heirs reversed in part and remanded.

---

[2] We note that appellant's response to the motion to dismiss incorrectly states that the appeals were previously dismissed without prejudice.

1. Indian Probate: Claim Against Estate: Generally

The Board is not limited in its scope of
review of an Administrative Law Judge's
lisposition of claims and may exercise
he inherent authority of the Secretary to
orrect a manifest injustice or clear error
vhere appropriate.

. Indian Probate: Claim Against Estate: Proof of Claim

t would defeat the intent of Congress,
hich has formulated strict rules for the
ecretary to follow in the management
f trust property, for claims arising from
lleged agreements affecting trust realty
be allowed on the basis of mere parol
idence. The potential for fraud would
herwise be too great.

Indian Probate: Claim Against tate: Generally

e amount of a claim which must be
id from trust assets is as crucial a
cision as whether such claim should be
id at all. It would therefore be im-
per for the Administrative Law Judge
allow the agency superintendent to
ermine the amount of an approved
im which must be paid a general cred-
r based on future documentation of
creditor's exhaustion of an Indian
edent's non-trust assets.

Indian Probate: Claim Against ate: Source of Funds for Payment

ile the Department's regulations do
explicitly recite that trust assets may
utilized for the payment of general
litors' claims only after all other
ces of compensation have been ex-
sted, this limitation is implicit in
the Department's regulatory plan
the payment of claims and in the na-
of the trust relationship between the
etary and Indian heirs of allotted
s. Any trustee, let alone the Secre-
would be derelict who generally
nits trust funds to pay debts legally
ensable from other sources.

5. Indian Probate: Claim Against Estate: Timely Filing: Generally

In accordance with 43 CFR 4.250, all claims against the estate of a deceased Indian held by creditors chargeable with notice of the hearing under 43 CFR 4.211 (c) shall be filed prior to the conclusion of the first probate hearing and if they are not so filed, they shall be forever barred.

APPEARANCES: **William B. Sherman, Esq., for appellants Aurice Kipp Show and Max Lee Kipp; James C. Nelson, Esq., for creditor Glacier County Bank.**

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

INTERIOR BOARD OF INDIAN APPEALS

On Oct. 26, 1977, John Joseph Kipp died intestate at the age of 52 at Great Falls, Montana. He is survived by his widow, Betty Joy Kipp, and an adopted son, Martin James Kipp. Decedent was the beneficial owner of real property on the Blackfeet reservation in Montana held in trust by the United States under the provisions of the General Allotment Act of Feb. 8, 1887, 24 Stat. 388, 25 U.S.C. §§ 331–358 (1976). The value of the trust real property for purposes of probate was estimated at $80,451.12 (including buildings on the land valued at $10,000). At the time of decedent's death, there were apparently no cash assets in his Individual Indian Money Account at the Blackfeet Agency. However, in addition to his trust property, decedent possessed extensive assets in non-trust realty and personalty. Seven claims totaling more than $186,000 were presented against the trust estate in the proceedings below.

Two hearings were conducted in this probate, the second of which was a supplemental hearing on the sole issue of the estate's liability for claims of indebtedness previously filed. On Mar. 30, 1979, Administrative Law Judge David J. McKee entered an order determining heirs. Included in this order were separate rulings allowing or disallowing the various claims at issue.

Aurice Kipp Show, decedent's surviving sister, and Max Lee Kipp, a surviving brother, filed a petition for rehearing from the above order on May 4, 1979. The petitioners alleged that Judge McKee had erroneously denied their claims for unpaid rental allegedly due them by the deceased for the use of land. This petition was denied by Judge McKee by order dated June 6, 1979.

A notice of appeal from the order denying petition for rehearing was filed with the Board of Indian Appeals on Aug. 6, 1979, by William B. Sherman as counsel for Aurice Kipp Show and Max Lee Kipp. Appellants' opening brief was filed in this matter on Oct. 23, 1979. The only other brief received by the Board is a statement filed by James C. Nelson, counsel for the Bank of Glacier County, which received conditional approval from Judge McKee for its claim filed against the estate in the amount of $99,096.18.[1]

Scope of Review

[1] In the course of evaluating the Administrative Law Judge's disposition of appellants' claims, the Board has examined the basis on which other claims were either allowed or disallowed in this case. As a result of this review, it is considered necessary in this decision to reverse the Judge's allowance of one of these claims and to qualify the extent to which other claims approved by the Administrative Law Judge and from which no appeal was taken are, under law, actually payable. This expanded consideration of the decision appealed from is authorized by 43 CFR 4.290 which states in part: "The Board shall not be limited in its scope of review any may exercise the inherent authority of the Secretary to correct a manifest injustice or error where appropriate."

Discussion, Findings and Conclusions

In his order determining heirs, the Administrative Law Judge ruled on seven separate claims against decedent's estate as follows:

---

[1] Decedent's widow, Betty Joy Kipp, has submitted several statements urging expedited resolution of this appeal without addressing the merits of appellants' claims. Counsel James W. Zion, Helena, Montana, submitted a certificate of representation to the Board on behalf of the Mildred Kipp, descedent's former spouse, but no brief or other statement was subsequently filed.

1. Denied claim of Aurice Kipp Show (appellant herein) in the amount of $14,953.50, allegedly due on an oral promise to compensate for use of trust land.

2. Denied claim of Max Lee Kipp (appellant herein) in the amount of $7,226.75, allegedly due on an oral promise to compensate for use of trust land.

3. Denied claim of Woodrow Kipp, a brother of decedent, in the amount of $2,500, allegedly due on an oral promise to compensate for trust land acquired by gift deed.

4. Approved claim of the Blackfeet Tribe in the amount of $4,517.30 for unpaid balance on a loan which was secured by a Departmentally approved Assignment of Trust Property and Power to Lease dated Oct. 26, 1959.

5. Approved claim of Bank of Glacier County in the amount of $99,096.18, secured in part by liens on non-trust property and assets, to the extent such unpaid indebtedness is not satisfied by "the total liquidation of all non-trust security held by the Bank."

6. Approved claim of Good-Tabaracci, Inc., in the amount of $1,875 (plus interest) for unpaid balance on crop hail insurance.

7. Approved claim of Mildred Kipp, former spouse of decedent, in the amount of $55,000 based on State court divorce decree and subject to limitation that deduction be made for "amounts already paid thereon from whatever source."

For the reasons set forth below, the Board affirms the Administrative Law Judge's disposition of Claim Nos. 1 through 4 as enumerated above; remands for further proceedings the disposition of Claim Nos. 5 and 6; and reverses the ruling on Claim No. 7.

[2] The claims of Aurice Kipp Show, Max Lee Kipp, and Woodrow Kipp are not allowable for the simple reason that insufficient proof was offered by these claimants to establish a legal indebtedness of the decedent to them. By law, it was incumbent on those either leasing or deeding any interest in trust lands to the decedent during his lifetime to obtain Departmental approval. *See* 25 CFR 121.17–121.23 and 25 CFR Part 131.[2] Yet, no records were produced by these claimants in support of their claims that the decedent either acquired trust land or the use of trust land from them through a compensation agreement.

In short, it would defeat the intent of Congress, which has formulated strict rules for the Secretary to follow in the management of trust property, for claims arising from alleged agreements affecting trust realty to be allowed on the basis of mere parol evidence. The potential for fraud would otherwise be too great.

In contrast to Claim Nos. 1 through 3 above, the Blackfeet

---

[2] The statutory authority for these regulatory requirements appears in scattered secs. of volume 25 of the *United States Code*. For complete listings, see "Authority" preface to the rules cited.

Tribe produced competent evidence of a valid claim against decedent's estate. The indebtedness was proven by documentary evidence and, in accordance with statute, the encumbrance on decedent's trust property had received Departmental approval. *See* 25 U.S.C. § 483a (1976).[3]

The claim by the Bank of Glacier County was also supported by documentary evidence. Unlike the claim of the Blackfeet Tribe, however, it is not secured by any liens against decedent's trust property. Under the circumstances, it was correct for the Administrative Law Judge to allow this claim as one established by any other general creditor, pursuant to the provisions of 43 CFR 4.250–4.251.

[3] However, it appears from the order approving the bank's claim that the specific amount of compensation to be given this creditor was left to the agency superintendent to decide, based on future documentation of the bank's exhaustion of decedent's non-trust assets.[4] Such a procedure is improper.

The amount of a claim which must be paid from trust assets is as crucial a decision as whether such claim should be paid at all. This fact is patently clear where, as here, the amount claimed exceeds the estimated value of the trust estate as a whole. The Department's regulatory scheme for the payment of claims, found in 43 CFR 4.250–4.252, clearly envisions that the Administrative Law Judge presented a claim will decide the amount of payment, if any, to which a claimant is entitled. *See also* 43 CFR 4.240(a)(3). This decision often bears on mixed questions of fact and law, as cited in the foregoing regulations, and, where even on fact alone, it remains a matter which is best decided in a quasi-judicial setting. Simply stated, what the Superintendent should hear from the Administrative Law Judge is how much to pay a creditor on a proven claim.[5]

There is a similar problem with respect to the claim of Good–Tabaracci, Inc. That is, the record is devoid of any evidence that this general creditor's claim cannot be satisfied from non-trust assets of the decedent.

[4] While the Department's regulations do not explicitly recite that trust assets may be utilized for

---

[3] The tribe's claims is allowable in this case as a preferred claim notwithstanding the fact it could obtain redress by means of foreclosure or other methods prescribed in its lending agreement with decedent. Since there was no objection to the tribe's claim, it is presumed the heirs at law preferred settlement of the estate's indebtedness to the tribe through the probate claims procedure rather than possibly losing certain lands by foreclosure. *See* and compare *Estate of Lawrence Ecoffey*, 5 IBIA 85 (1976); *Acting Associate Solicitor's Memorandum (Indian Affairs) to Examiner Montgomery*, A–58–1104.9A (Apr. 14, 1958).

[4] *See* Order Determining Heirs dated Mar. 30, 1979, at pp. 5–7.

[5] In some cases, this will require retention of jurisdiction over a case by the Administrative Law Judge until a creditor can prove that non-trust assets or other securities have been exhausted and that a sum certain from the trust estate is therefore owing.

By regulation, there is one exception to the principle that only the Administrative Law Judge may determine and award claims. At 43 CFR 4.271 it is provided that agency superintendents may determine and award creditors' claims when the value of a deceased Indian's trust personal property and cash is less than $1,000.

the payment of general creditors' claims only after all other sources of compensation have been exhausted, this limitation is implicit in both the Department's regulatory plan for the payment of claims[6] and in the nature of the trust relationship between the Secretary and Indian heirs of allotted land.[7] For that matter, any trustee, let alone the Secretary, would be derelict who generally commits trust funds to pay debts legally compensable from other sources.[8]

The Board sees no recourse but to remand this matter to the Administrative Law Judge[9] for the receipt of evidence and entry of a specific order allowing the claims of the Bank of Glacier County and Good–Tabaracci, Inc., in specific amounts authorized by law and Departmental regulations.

[5] Finally, the claim of Mildred Kipp should have been disallowed by the Administrative Law Judge as untimely filed. At 43 CFR 4.250 (a), it is provided:

> (a) All claims against the estate of a deceased Indian held by creditors chargeable with notice of the hearing under § 4.211(c) shall be filed with either the Superintendent or the Administrative Law Judge prior to the conclusion of the first hearing, *and if they are not so filed, they shall be forever barred.* [Italics supplied.]

Mildred Kipp filed her claim with the Administrative Law Judge on Aug. 28, 1978, one day before the second hearing held in the probate of decedent's estate. The first hearing was held May 9, 1978, and it was prior to the conclusion of such hearing when Mildred Kipp was required to file her claim.[10]

---

[6] Note, for example, 43 CFR 4.250(b) which states in part: "[C]laims shall show the names and addresses of all parties in addition to the decedent from whom payment might be sought."

[7] Consistent with the Secretary's trust responsibility to Indian heirs of allotted land, it has long been recognized by the Department that claims against an estate may not be enforced through the sale of trust lands. *Estate of John J. Akers*, 1 IBIA 246, 259 (1972).

[8] In a dissenting opinion in this case, it is submitted that because allotted lands are not subject to liens of indebtedness incurred while title is held in trust (25 U.S.C. § 354 (1976)), the Secretary lacks authority to administratively allow claims against trust estates.

During the 70 years in which the Department has been allowing claims against trust estates, only one Federal district court has used the above argument to disallow a claim. *Running Horse* v. *Udall*, 211 F. Supp. 586 (D.D.C. 1962). There, the court held that the Secretary could not compensate a state for old-age assistance payments rendered a deceased Indian from trust assets of the deceased. Departmental regulations were subsequently changed to accommodate the court's holding. *See* 43 CFR 4.250(g). Notwithstanding the possible merits of the dissenting opinion, it remains beyond the authority of this Board to declare invalid the various regulations of the Department allowing the payment of claims.

For the proposition that the Secretary possesses implied legal authority to allow claims in Indian probate proceedings held in accordance with 25 U.S.C. §§ 372–373 (1976), *see* Felix Cohen's *Handbook of Federal Indian Law* at 231 (U.N.M. ed. 1971); *Solicitor's Opinion*, 61 I.D. 37 (1952); 25 U.S.C. § 373a (1976) (an Act adopted in 1942 relating to escheat wherein Congress expressly authorizes the Secretary to pay creditors' claims); and *Estate of Martin Spotted Horse, Sr.*, 2 IBIA 265, 81 I.D. 227 (1974). In addition to the foregoing, we merely note the following: To the extent that Indians exist daily on lines of credit furnished them by grocers, doctors, and other life-blood creditors, it is difficult to perceive the good of a rule which would either deny them this lifestyle or seriously impair it through some form of "Departmental approval" requirement.

[9] Administrative Law Judge McKee has retired. Remand will therefore be made to his successor, Administrative Law Judge Alexander H. Wilson.

Therefore, by virtue of the authority delegated the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of Administrative Law Judge David J. McKee, dated June 6, 1979, denying appellants' petition for rehearing, is affirmed. However, the Order Determining Heirs dated Mar. 30, 1979, is reversed as to that part of the decision allowing the claim of Mildred Kipp. Further, this estate is remanded to the Administrative Law Judge with jurisdiction over the matter to receive evidence and make specific findings, conclusions and orders as to the amount of compensation, if any, the Bank of Glacier County and Good-Tabaracci, Inc., are entitled to receive from the Department consistent with this opinion and the regulatory requirements of 43 CFR 4.250–4.252.

Wm. Philip Horton
Chief Administrative Judge

I concur:

Mitchell J. Sabagh
Administrative Judge

ADMINISTRATIVE JUDGE ARNESS DISSENTING:

Presentation of creditors' claims to the Administrative Law Judge during probate against decedent's interests in allotted trust lands raises issues in this probate which require construction of provisions of the General Allotment Act, the Act of Feb. 8, 1887, 24 Stat. 388, 390 (25 U.S.C. §§ 331, 349 (1976)). The Allotment Act is characterized thus by the Court of Appeals for a circuit where a large amount of allotted land is situated: "The paternalism that characterizes the Allotment Act undoubtedly now offends many Indians and non-Indians, but we are free neither to rewrite history nor to redraft the Act to conform to our notions of contemporary social attitudes" (*Akers* v. *Morton*, 499 F.2d 44, 48, n.3 (9th Cir. 1974), *cert. denied*, 423 U.S. 831 (1975)).

The main purpose of the General Allotment Act is to end the tribal and nomadic ways of life among the Indians, to encourage family farming among them, to protect the allottees' interest in their trust lands and provide their families with permanent homes (*Hopkins* v. *United States*, 414 F.2d 464 (9th Cir. 1969)). Sec. 1 of the Act, 25 U.S.C. § 331 (1976), provides for allotments to individuals for agricultural purposes. After 25 years the United States is to "convey * * * [a patent] to said Indian, or his heirs * * * in fee, discharged of said trust and free of all charge or incumbrance" (25 U.S.C. § 348 (1976)).

---

[10] It is noted that Mildred Kipp has a remedy at law for satisfaction of her claim by virtue of the decree of divorce entered in Probate No. 2972, District Court of the Ninth Judicial District, State of Montana, County of Glacier, on Jan. 2, 1975. The foregoing judgment does not purport to affect decedent's trust property. If it does, it is to such extent voidable. *See Mullen* v. *Simmons*, 234 U.S. 192 (1914).

When the fee patent is given, the lands shall then become subject to state law, but until then, "[S]aid land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent" (25 U.S.C. § 349 (1976)). The President extended the trust period (to the lands here in issue) until the period of trust responsibility was extended indefinitely by the Indian Reorganization Act of 1934 (Act of June 18, 1934, 48 Stat. 984 (25 U.S.C. § 462 (1976)). The 1887 Act contains no exception to the provision prohibiting encumbrance of the land allotted prior to discharge of the trust: If such exceptions exist, they must appear in later enactments.

The development of an elaborate scheme of probate administration by the Secretary was probably not in contemplation of Congress in 1887 when the General Allotment Act became law. Pursuant to the Act the Secretary divided the reservations affected into allotments which were distributed to individual Indians subject to restrictions against alienation.[1] The continued extension of the trust period, however, made some sort of probate procedure appear necessary. The current probate practices derive from the Act of June 25, 1910,[2] which made the administration of the estates of individual Indians the exclusive province of the Secretary, subject to infrequent judicial review of decisions.[3]

The practice of allowing claims began immediately following the 1910 statutory probate enactments and was formalized in Departmental regulations.[4] The regulations promulgated in 1935 reflect the policies applied in earlier Departmental orders in probate cases decided in the course of the Secretary's administration of Indian estates, and present the same general scheme as regulations currently in effect published at 43 CFR Part 4, Subpart D.[5] The early creditors' claims appear to have been for relatively insignificant amounts which were small in relation to the trust estate; the payment to the creditors was often made in a reduced amount or denied altogether if the estate was small or the condition of the heirs seemed to warrant reduced payment or denial of payment.[6]

---

[1] The Blackfeet reservation is one of the reservations directly affected by the Act; it was created by the Act of Apr. 15, 1874, 18 Stat. 28.

[2] 36 Stat. 856, 25 U.S.C. § 373 (1976), *as amended*. The evolution of Departmental probate practice is traced in the introduction to *Digest of Federal Indian Probate Law*, Office of Hearings and Appeals (1972). Currently, the probate of Indian trust estates is administered by Indian probate Administrative Law Judges under the provisions of Departmental regulation 43 CFR Part 4, Subpart D, whose administration of probate matters is reviewable by this Board in the Office of Hearings and Appeals, Department of the Interior. 36 FR 7186 (Apr. 15, 1971); 36 FR 24813 (Dec. 23, 1971).

[3] *See Tooahnippah* v. *Hickel*, 397 U.S. 598 (1970), for a discussion of judicial review of Departmental probate proceedings. Early cases established that the power of the Secretary to handle these matters was virually exclusive. *McKay* v. *Kalyton*, 204 U.S. 458 (1907); *Hy-yu-tse-mil-kin* v. *Smith*, 194 U.S. 401 (1904); *Bond* v. *United States*, 181 F. 613 (C.C. Or. 1910).

[4] Following the June 25, 1910, Act, regulations were issued in 1910 by the Secretary; regulations were again published in 1915, and revised in 1923 and 1935. *Determination of Heirs and Approval of Wills of Indians Except Members of the Five Civilized Tribes and the Osages, Regulations. May 31, 1935,* 55 I.D. 263.

[5] Specifically 43 CFR 4.250 through 4.252. Previously appearing at 25 CFR Part 15, the probate regulations were republished at 43 CFR Part 4 in 1971, concurrent with the establishment of the Office of Hearings and Appeals. 43 CFR 4.252, the section of the regulation construed by this opinion, appears for the first time in that publication of the Rules. 36 FR 24813 (Dec. 23, 1971).

However, except as provided by Congress, the Secretary is not authorized to allow debts incurred by an Indian decedent to be a charge or encumbrance against the decedent's trust property in the hands of his Indian heirs (25 U.S.C. § 349 (1976); *Squire* v. *Capoeman*, 351 U.S. 1 (1956); *House* v. *United States*, 144 F.2d 555, *cert. denied*, 323 U.S. 781 (1944); *Running Horse* v. *Udall*, 211 F. Supp. 586 (D.D.C. 1962); *Estate of Phillip Tooisgah*, 4 IBIA 541, 82 I.D. 541 (1975), *aff'd Tooisgah* v. *Kleppe*, 418 F. Supp. 913 (W.D. Okla. 1976); Solicitor's Opinion M-36066 (Feb. 3, 1959)). Not only does the Act of June 25, 1910, not provide for the allowance of creditors' claims against such estates, the Act of Feb. 8, 1887, specifically forbids the practice.[7] Congress has, however, created several statutory exceptions to the general rule established by the 1887 Act. Thus, provision is made for payment of creditors' claims from estates which escheat (Act of Nov. 24, 1942, 56 Stat. 1021, 25 U.S.C. § 373a and b (1976)). Encumbrance is permitted also, where the Secretary previously has approved a mortgage of the trust property during the decedent's lifetime (25 U.S.C. § 483a (1976)) or the creation of a security interest in cash trust assets for purposes consistent with the exercise of the trust responsibility (25 U.S.C. § 410 (1976)). The Departmental creditors claims regulation, 43 CFR 4.252, recognizes the limited scope within which payment of claims may be made, providing they may be allowed only to the extent not "prohibited by law." There appears to be no reason why a procedure for obtaining prior approval of commercial claims could not be devised within the statutory framework. (Mortgages under 25 U.S.C. § 483a are currently administered pursuant to 25 CFR 121.34.)

---

[6] *See*, for example, *Estate of Samuel John Eagle Horse*, Probate 165.1 (Sept. 6, 1911), where claims totaling $392.30 were disallowed against an estate composed of $30.80 in cash and trust land valued at $665.81.

Most reported instances involving Departmental approval of creditors' claims appear after 1910. Representative claims, usually for less than $100, include claims for groceries and auto repairs (*Estate of Phillip American Bear*, Probate 1818–33 (Dec. 2, 1933)); repayment of prior approved loans (*Estate of Noah Bad Wound*, Probate 78151–38 (May 9, 1939)); support of decedent by maternal grandmother (*Estate of Mary Bear Looks Behind*, Probate 102279–21 (Dec. 20, 1921)); casket (*Estate of Black Eagle*, Probate 36381–34 (Apr. 18, 1935)); nursing care (*Estate of Black Hawk*, Probate 63211.30 (Jan. 28, 1935)); clothing (*Estate of Blue Eyes*, Probate 36659–26 (June 21, 1933)); abstractor's fee (*Estate of William Carpenter*, Probate 55428–34 (Mar. 29, 1935)); alimony and child support (*Estate of Eleanora Devine*, Probate 33411.29 (July 23, 1929)); State old age assistance (*Estate of Lucy Little Tail*, Probate 25973–38 (July 20, 1943)); surgeons fees and hospital bills (*Estate of Fred Loudner*, Probate 14035 (Apr. 3, 1935)); "luxury items" (*Estate of William Palmier*, Probate 17609–35 (June 21, 1935)); gasoline, oil, tires, chains, car battery, and coal (*Estate of Charles Roubideaux, Sr.*, Probate 86116 (May 24, 1937)); hauling wood and water (*Estate of Sharp Pointed*, Probate 11948.36 (Sept. 30, 1936)); tribal court judgment (*Estate of Lucy Spotted Crow*, Probate 20370–32 (Aug. 8, 1932)); car repair and restaurant bill (*Estate of Foster Thunderhawk*, Probate 31837–26 (Feb. 27, 1940)); and a loan secured by a note (*Estate of Benjamin Quapaw*, Probate 28098–20 (Mar. 14. 1927)).

[7] Questions concerning the availability of assets to satisfy unpaid claims usually focus on income derived from the land rather than the land itself, since the prime reason for holding the land in trust is to keep it unencumbered. It now appears settled that income derived directly from the land is also trust property and cannot be encumbered. (This has not always been clearly the rule, however. *See Jones* v. *Taunah*, 186 F.2d 445 (10th Cir. 1951), *rev'd*, in *Squire* v. *Capoeman*, *above*.) What constitutes income derived directly from the land may be difficult to ascertain in some cases but farm land being farmed by the beneficial owner produces income that retains the trust character *Critzer* v. *United States*,—Ct. Cl.—(Apr. 18, 1979), 47 U.S.L.W. 2684.

A 1952 Solicitor's opinion takes official notice that secs. 1 and 2 of the Act of June 25, 1910, contain no provision for the allowance of creditors' claims (Solicitor's Opinion, 61 I.D. 37 (1952)).[8] Despite the absence of statutory authority for the payment of such claims, however, the opinion finds an implied authority in the Secretary to approve creditors' claims, based upon reasoning that accepts analogy to state probate proceedings as a necessary part of the distribution of Indian estates. The position expressed by the 1952 opinion apparently represented the position of the Department until 1962, when the opinion in *Running Horse* v. *Udall*, *above*, held the Departmental position as stated by the Solicitor to be erroneous while holding a creditor's claim invalid based upon analysis of the 1887 Allotment Act and the Act of June 25, 1910.

In *Running Horse* an order determining heirs had allowed payment from trust assets to be made to the creditor State of South Dakota, a practice the court found to be beyond the authority of the Secretary where there were living heirs who were denied the benefit of the trust property which was subject to the Secretary's administration pursuant to the General Allotment Act.[9] The interaction of the 1887 Act and the 1910 Act was considered by the opinion, which concluded that no implied authority to allow creditors' claims could be derived from a statutory scheme which expressly forbids any encumbrance of the land which is the subject of the legislation. The reasoning of the court in *Running Horse* thus disapproves the logic of the 1952 Solicitor's opinion. The rationale for allowing creditors' claims stated in the 1952 opinion, however, later became the basis for the opinion in the *Estate of Martin Spotted Horse*, 2 IBIA 265, 81 I.D. 227 (1974), relied upon by the majority opinion.

---

[8] The opinion indicates concern about the continuing Departmental practice of allowing claims against trust estates, in light of enactment of an escheat statute expressly providing for allowance of creditors' claims against trust estates, apparently as an express exception to the general rule that claims against such property are unenforceable. The opinion concludes that the claims practice based upon custom should continue, but that some regulatory reform is required in order to provide a basis for such payments.

[9] 211 F. Supp. at 588. The court first found at p. 587, in a fact situation nearly identical to that in this probate, that:

"4. The land referred to above originally was allotted by trust patent No. 276674 dated June 18, 1912, from the United States to Abraham Running Horse, Rosebud Sioux Allottee No. 6095, and inherited by James Running Horse from the trust patentee. The trust patent was issued under the Sioux Allotment Act of March 2, 1889, 25 Stat. 888, which by reference incorporates the provisions of Section 6 of the General Allotment Act of February 8, 1887, 24 Stat. 390, 25 U.S.C. § 349, as amended. Under the terms of the Sioux Allotment Act, the United States agreed to hold the land, 'in trust for the sole use and benefit' of Abraham Running Horse or, in the case of his death, of his heirs; and further agreed, upon the expiration of the trust period, to convey the land to Abraham Running Horse or, in case of his death, to his heirs, 'in fee, discharged of said trust and free of all charge or incumbrance whatsoever: * * *'; and further agreed that such trust lands 'shall not be liable to the satisfaction of any debt contracted prior to the issuing of such [fee] patent: * * *.' The trust period is now and has been in effect at all times material to this case."

The opinion in *Spotted Horse* allowed three creditors' claims, two of which had not been given prior Secretarial approval, and which, therefore, lacked a specific statutory basis. *Spotted Horse* repeats the rationale of the 1952 Solicitor's opinion struck down by the district court. No attempt is made to distinguish the holding in the *Running Horse* decision, although there is an inference in *Spotted Horse* that *Running Horse* is limited to its facts. (The amendment of Departmental regulations to provide that state old age assistance claims are not payable from trust assets seems to confirm that this became the Departmental position.) Such an interpretation recognizes a claims practice that has been followed since 1910, but ignores the *Running Horse* holding that "[t]he Secretary is not authorized by law to allow debts incurred by an Indian decedent as a charge or encumbrance against the decedent's trust property in the hands of his Indian heirs."[10] *Running Horse* and *Spotted Horse* simply cannot be reconciled.

It is a general rule of construction in statutes involving Indian affairs that doubtful statutory language must be interpreted in favor of the Indians. *Worchester* v. *Georgia*, 31 U.S. (6 Pet.) 214 (1832); *Bryan* v. *Itasca County, Minnesota*, 426 U.S. 373 (1976). In the case where creditors seek to encumber trust property established by the General Allotment Act, however, there is no ambiguity. The 1887 Allotment Act forbids allowance of encumbrances prior to termination of the trust status of allotted lands. Restrictions on lands imposed by the General Allotment Act run with the land: not being personal to the individual allottee, the restrictions continue until the time set for their expiration by Congress. *Bowling* v. *United States*, 233 U.S. 528 (1914); *United States* v. *Noble*, 237 U.S. 74 (1915); *Couch* v. *Udall*, 404 F.2d 97 (1968). The restriction is not affected by the death of the original allottee, nor by changes in the personal status of the allotment holder. *Oklahoma Gas & Electric Co.* v. *United States*, 609 F.2d 1365 (10th Cir. 1979). Whatever the situations of the original allottees and their families may have been in the first half of the twentieth century, which may perhaps have led the Department to pay creditors' claims from trust assets, the conditions of the second half of the century exemplified by the estate here in probate indicate that creditors' claims presented against the trust estate of a small farmer are considerable, and are capable of effectively eliminating existing allotments.

---

[10] *Id.* at p. 588. More importantly, the position taken ignores the *Running Horse* reasoning and the legal basis for the holding, which is unassailable.

The trust estate here in probate is only a part of the total estate of the decedent: The record indicates the greater part of his estate is in probate in the state district court, while certain personal effects are subject to the jurisdiction of a tribal court established pursuant to 25 CFR Subchapter B, Part 11. Three different tribunals—State, Departmental, and tribal are now administering parts of decedent's estate. This situation exposes the fallacy in the thesis that the Departmental practice must afford to ommercial and other creditors the ame rights they would enjoy if the rust estate were unrestricted: to fford the benefits of the Allotment ct to decedent's heirs does not eprive his creditors of a forum for resentation of their claims.

The majority opinion expresses oncern that a holding which ex- mpts trust property from all credi- rs' claims will result in a denial f credit to allottees and their heirs y the general commercial commu- ty. It overlooks the statutory ceptions permitting certain mort- ges and encumbrances of person- ty. And it assumes that the allot- s have no other assets—an assumption which is demonstrably false in this instance. The majority position shows a willingness to "redraft the act to conform to our notions of contemporary social attitudes." [11]

Congress exercises plenary power in the area of Indian affairs. *United States* v. *Kagama*, 118 U.S. 375 (1886). In the case of the restriction against encumbrance it imposed upon trust lands with the passage of the 1887 Allotment Act, it has created several exceptions. Trust lands can be encumbered by the beneficial owner with the prior approval of the Secretary, for approved purposes, as was done in the case of the mortgage given by decedent to the Blackfeet Tribe (25 CFR 121.34, implementing 25 U.S.C. §§ 483a, 410 (1976)). The very existence of the statutory exceptions indicates that, in the case of the General Allotment Act, as with Indian legislation in general, it is not proper to graft interpretations unfavorable to Indians onto the Act without express authority for such a position. (*Bryan* v. *Itasca County*, *above*.) If exceptions are intended to the general rule that there shall be no encumbrance of trust lands in the hands of allottees or their living heirs, Congress must enact those exceptions in specific legislation.[12]

---

[11] Allowance of the exemption for this class of property from the claims of creditors merely recognizes a class of property to be exempt from such claims in addition to the exemptions permitted by State laws. The record of this case indicates that, except for the tribe, none of the creditors placed any reliance upon the trust property when they extended credit to decedent.

Of the seven claims presented against the estate, only one was presented for prior approval by the Secretary during decedent's lifetime pursuant to provisions of 25 U.S.C. § 483a (1976). The claim of the Blackfeet Tribe is entitled to approval for payment subject to the limitations stated at 43 CFR 4.251 (d). The remaining claims are barred by the provisions of 25 U.S.C. § 349 (1976). The estate should therefore be remanded to the Administrative Law Judge with instructions to disapprove all creditors' claims except the claim by the Blackfeet Tribe.

FRANKLIN ARNESS
Administrative Judge

CHEYENNE RESOURCES, INC.

46 IBLA 277

Decided *March 27, 1980*

Appeal from decision of the Wyoming State Office, Bureau of Land Management, rejecting simultaneous oil and gas lease offer W 68690.

Affirmed.

1. Oil and Gas Leases: Applications: Generally—Oil and Gas Leases: First-Qualified Applicant

An oil and gas lease offer filed in the name of a corporation in a simultaneous filing is properly rejected where it is not accompanied either by corporate qualification papers or by any reference to a serial number where such information might be found, as required by 43 CFR 3102.4-1. Such omissions cannot be cured after the drawing.

2. Administrative Procedure: Hearings—Hearings—Oil and Gas Leases: Applications: Generally—Rules of Practice: Hearings

Where a corporate simultaneous oil and gas lease offeror alleges no facts which could disprove its failure to comply with 43 CFR 3102.4-1, no hearing will be granted as requested.

3. Administrative Procedure: Decisions—Board of Land Appeals

As precedents, decisions of the Board of Land Appeals should be cited by the volume and page number given on the bottom of the page of the decision and not to the IBLA docket number shown on the top of the decision.

4. Administrative Practice—Administrative Procedure: Decisions—Board of Land Appeals—Bureau of Land Management

Decisions of the Interior Board of Land Appeals are indexed, digested, and available for public inspection pursuant to published Departmental regulations. They meet the requirements of the Administrative Procedure Act and serve as binding Departmental precedents. However, adjudicative decisions by local Bureau of Land Management offices do not meet requirements of the Administrative Procedure Act and are not binding precedents.

---

[12] While the rule urged by this opinion would change Departmental practices, the continued adherence to an erroneous practice cannot be justified merely to avoid disruption of customary usage. This Board has the authority to announce such a change in Departmental practice. *United States* v. *Winegar*, 16 IBLA 112, 81 I.D. 370 (1974), *rev'd on other grounds sub nom. Shell Oil Co.* v. *Kleppe*, 426 F. Supp. 894 (D. Colo. 1977). See Solicitor's Opinion, 84 I.D. 54, 62 (1976); Solicitor's Opinion, 84 I.D. 443, 453 (1977); Solicitor's Opinion, 86 I.D. 307, 318 (1979).

APPEARANCES: Robert R. Spatz, President, Cheyenne Resources, Inc.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

INTERIOR BOARD OF LAND APPEALS

Cheyenne Resources, Inc., appealed from the July 27, 1979, decision of the Wyoming State Office, Bureau of Land Management (BLM), which rejected its simultaneous oil and gas lease offer W 68690 for Parcel No. 1696 of the June 1979 list. The offer was filed in a simultaneous drawing procedure held pursuant to 43 CFR Subpart 3112. BLM rejected this drawing entry card offer, executed on behalf of Cheyenne Resources, Inc., because it was accompanied neither by evidence of corporate qualifications nor by any reference to a previously filed statement of corporate qualifications.

Appellant argues primarily that shortly after the drawing it referred BLM to its corporate qualifications on file; that rejection contradicts 43 CFR 3112.5; that BLM's cited authority, a Board decision, is "unpublished, unindexed and unpromulgated"; and that the rejection is arbitrary and capricious. Appellant also requests a hearing on various matters, including BLM guidelines, procedures, and regulations relating both to simultaneous and competitive oil and gas lease offers.

The determinative question in this case is whether appellant's offer complied with regulation 43 CFR 3102.4–1 which specifies in pertinent part:

> If the offeror is a corporation, the offer *must* be accompanied by a statement showing * * * (b) *that it is authorized to hold oil and gas leases* and that the officer executing the lease is authorized to act on behalf of the corporation in such matters, * * *. Where such material has previously been filed a *reference by serial number to the record in which it has been filed,* together with a statement as to any amendments *will be accepted.* [Italics supplied.]

[1] The Board has held repeatedly that this regulation is mandatory. Corporate offers which lack corporate qualification papers or the reference to previous filings must be rejected, *Anchors & Holes, Inc.*, 33 IBLA 339 (1978); *Dal Metro Investment Co.*, 29 IBLA 198 (1977), and cases cited. Appellant left blank that space on its drawing entry card which called for the serial number of the record of any previously filed corporate qualifications. Under the simultaneous drawing procedures, an oil and gas lease must be issued to the first-qualified applicant. 43 CFR 3112.4–1 and .5–1. "The Secretary is bound by his own regulation so long as it remains in effect. He is also bound * * * to treat alike all violators of his regulation." *McKay* v. *Wahlenmaier*, 226 F.2d 35, 43 (D.C. Cir. 1955). Because of its omission, appellant was not the first-qualified offeror.

A first-drawn simultaneous drawing entry card, defective for noncompliance with 43 CFR 3102.4–1, cannot be cured by submission of additional information after the drawing. *Don C. Bell II, Trustee*, 42 IBLA 21 (1979). Giving an unqualified first-drawn entrant additional time to file infringes on the rights of the second-drawn offeror. *Ballard E. Spencer Trust, Inc.* v. *Morton*, 554 F.2d 1067 (10th Cir. 1976), *aff'g*, *Ballard E. Spencer Trust, Inc.*, 18 IBLA 25 (1974). Thus, appellant's attempts to remedy the omission after the drawing could not cure the defect which required rejection.

Competitive leasing differs from simultaneous oil and gas leasing in that certain minor defects can be cured after the high bidder is chosen. The essential element of a simultaneous, noncompetitive lease offer is determination of the first-qualified offeror, whereas the amount bid is the determinative factor in the competitive leasing scheme. *Alaska Oil and Minerals Corp.*, 29 IBLA 224, 231, 84 I.D. 114, 118, n.1 (1977); *Ballard E. Spencer Trust, Inc., supra.* In competitive leasing, there is no second drawee whose rights would be infringed by cure of minor defects.

[2] Appellant requests a hearing. For the Board of Land Appeals to grant a hearing, in exercise of its discretion under 43 CFR 4.415, the appellant must allege facts which, if proved, would entitle it to the relief sought. *Foote Mineral Co.*, 34 IBLA 285, 85 I.D. 171 (1978); *Rodney Rolfe*, 25 IBLA 331, 83 I.D. 269 (1976). Here, the appellant has alleged no fact which, if proved, would compel a different legal conclusion. As we noted before, appellant's drawing card refers to the requirement in the regulations and also has a space for referencing the serial number where corporate qualifications have previously been filed. Nothing in appellant's lengthy appeal can excuse its failure to comply with the clear regulatory requirement.

[3] Most of appellant's arguments and all the matters upon which it requests a hearing are completely irrelevant to the crucial issue here of noncompliance with the regulation. Appellant has used a shotgun approach of attacking BLM and requesting a hearing on various types of administrative and policy functions. The only matter of any relevance here which has been raised by appellant is a citation error in the BLM decision. Although the decision correctly referred to the pertinent regulation, 43 CFR 3102.4–1, it added as a citation, "See *Pan Ocean Oil Corporation*, IBLA 71–112, April 12, 1971." This citation form is not correct. The number given is on the decision, but it is the number under which the appeal was docketed with this Board. This number is given at the top of the decision, but should not be used when citing a decision as precedent. The appropriate form for citing a decision of the Board of Land Appeals is by giving the name of the case, volume number of the decision, page number, and then the year of the decision. The vol-

ume and page numbers are given at the bottom of each page of the decisions. The first page of the decision is used for citation purposes. Thus, the appropriate citation should have been *Pan Ocean Oil Corporation*, 2 IBLA 156 (1971), and the decision could readily have been found at page 156 of Volume 2 of the Board's decisions in its looseleaf service.[1] This citation error is harmless because the consequences of the regulation are clear.

[4] In order to apprise appellant and others concerning Board decisions used as precedents in decisions, we point out the following. The availability of decisions by this Board is governed by Departmental regulations set forth at 43 CFR 2.2. Paragraph (a)(1) and subparagraph (ii) provide that such decisions are available for inspection and copying in the Office of Hearings and Appeals, Ballston Bldg. No. 3, 4015 Wilson Blvd., Arlington, Virginia 22203. Paragraph (3) of the regulation refers to the Index-Digest issued by this Department wherein certain opinions, including those by the Board of Land Appeals, are covered in the Index-Digest. Pursuant to the regulation, he Index-Digest is available for use by the public at the above address and also in the Docket and Records Section, Office of the Soicitor, Interior Bldg., Washington, D.C. 20240, and in the offices of the Regional Solicitors and Field Solicitors. While the regulations do not so require it, the Index-Digest and Board decisions should also be available at most BLM offices, at least, the State Offices. They may also be found in many good law libraries. We note that the *Pan Ocean Oil* decision could have been readily identified from either the name of the case list or through perusal of subject headings in the Index-Digest where the correct citation is given. It also could have been identified by this Board if inquiry had been made.

Because the Board of Land Appeals decisions are indexed and made available to the public in accordance with published rules, as described above, they may be "relied on, used, or cited as precedent" by Departmental officials, including those in BLM, in accordance with the Administrative Procedure Act, 5 U.S.C. § 552(a)(2) (1976).[2] Therefore, while Board of Land Appeals decisions serve as binding precedents for BLM, decisions of local BLM offices are not in the same category, not being final if an appeal is taken, not being indexed and otherwise not meeting the requirements of the Administrative Procedure Act for precedential opinions.

---

[1] Certain Board decisions are also published n the bound volumes, *Decisions of the Department of the Interior* (cited as I.D.). An additional citation to the volume and page umbers of the decision in the I.D.'s would lso be given.

[2] An opinion by the Assistant Solicitor, Branch of Land Appeals, prior to the creation of the Board of Land Appeals in July 1, 1970, *United States* v. *Johnson*, A-30191 (Apr. 2, 1965), held that Departmental decisions which are available for public inspection pursuant to published regulations were in accord with the provisions of the Administrative Procedure Act effective at that time even though they are not included in the volumes published as *Decisions of the Department of the Interior*. This is true today for decisions of the Board of Land Appeals.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Wyoming State Office is affirmed.

Joan B. Thompson
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

James L. Burski
Administrative Judge

FELL ENERGY COAL CORP.

2 IBSMA 34

Decided *March 28, 1980*

Appeal by the Office of Surface Mining Reclamation and Enforcement from a Nov. 7, 1979, decision of Administrative Law Judge David Torbett in Docket No. NX 9–99–R vacating Violation No. 1 of Notice of Violation No. 79–II–57–12, issued for failure to erect and maintain mine identification signs at all points of public access to the mine.

Reversed.

1. Surface Mining Control and Reclamation Act of 1977: Signs and Markers

The requirement of 30 CFR 715.12(b) that mine and permit identification signs be maintained until the release of all bonds is violated if such signs are not present during an inspection and the permittee has not exercised reasonable diligence to maintain them.

APPEARANCES: Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Office of the Solicitor, Washington, D.C., and John P. Williams, Esq., Office of the Field Solicitor, Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

On May 22, 1979, the Office of Surface Mining Reclamation and Enforcement (OSM), pursuant to the Surface Mining Control and Reclamation Act of 1977,[1] inspected an area in De Kalb County, Alabama, permitted by the State under permit number P–54 to Fell Energy Coal Corp. (the company). Mining had been completed at the site, but full revegetation was not yet achieved and the reclamation bond had not been released. OSM Inspector Dennis Winterringer issued Notice of Violation No. 79–II–57–12, containing two violations, to the company. Violation No. 2 was later vacated by OSM. Only Violation No. 1, failure to erect a mine and permit identification sign on an access road in violation of 30 CFR 715.12(b), is at issue.[2]

---

[1] 30 U.S.C. §§ 1201–1328 (Supp. I 1977).

[2] As part of Violation No. 1 the notice also stated that "the sign should not be removed until after release of all bonds."

H. R. Fell, president of the company, requested review of this violation on Aug. 2, 1979. A hearing was held on Oct. 19, 1979, before Administrative Law Judge David Torbett, who ruled that Fell had erected a sign as required, had not removed the sign, and had visited the site with reasonable regularity. The decision concluded that the company should not be held responsible for the fact that the sign was not present at the time of the inspection.

Discussion and Conclusions

The evidence supports the findings that Mr. Fell had erected a sign on the mine's access road and that he had not removed it. However, the evidence does not support the finding that he or others in the company visited the site with reasonable regularity. Fell knew the sign was being removed (Tr. 9A, 10, 12, 14).[3] The sign was replaced twice, once by Mr. Fell in October or November 1978, and a second time by his superintendent before February 1979, when Fell last visited the property (Tr. 14, 15, 22).[4] The Federal inspection was held on May 22, 1979, some 3 months later. On that date no sign was in evidence. Moreover, Mr. Fell testified that he did not know whether a sign was up on Oct. 19, 1979, the date of the hearing (Tr. 18). Since he testified he last visited the site in February 1979 and that the last sign was erected before February 1979, the conclusion is inescapable that he either did not visit the site between February and October 19, a period of about 8 months, or, if he visited it after May 22, he did not replace the sign. This is neither reasonable regularity nor reasonable diligence.

[1] Mine and permit identification signs are required to be erected at all points of public access to the mine by 30 CFR 715.12(b).[5] These signs are not to be removed until the release of all bonds. Because the required sign was not present at the time of the inspection and the bonds had not been released, Violation No. 1 of the Notice of Violation was properly issued. Since the company did not exercise reasonable diligence in maintaining a sign, it cannot be excused from compliance with the statute and regulations.[6]

---

[3] Mr. Fell wrote to OSM, complaining that he land owner had removed the signs (Tr. 9A). After the OSM Inspector testified that he owner denied this, Mr. Fell stated that his allegation was based on conjecture and hat he did not know who removed the signs (Tr. 10, 12).

[4] On Mar. 7, 1979, an Alabama State inspector saw the sign (Tr. 22, 23). Although Fell saw the State inspector's report, there is no evidence as to when he saw it.

[5] Sec. 715.12(b) reads: "*Mine and permit identification signs.* Signs identifying the mine area shall be displayed at all points of access to the permit area from public roads and highways. * * * Such signs shall not be removed until after release of all bonds."

[6] Judge Torbett concluded that the mine operator is not an insurer and thus not responsible for absence of the sign due to acts of God or vandalism. Because of our holding herein, we need not and do not decide whether the permittee's responsibility is absolute, or if under different circumstances the violation might properly be vacated. Circumstances such as those suggested during the hearing might be considered in determining the amount of any civil penalty, if one is imposed.

Therefore, because the evidence indicates that there was a violation of 30 CFR 715.12(b), Violation No. 1 of Notice of Violation No. 79-II-57-12 should not have been vacated. That violation was properly issued and the decision of Nov. 7, 1979, is reversed.

NEWTON FRISHBERG
Administrative Judge

WILL A. IRWIN
Chief Administrative Judge

MELVIN J. MIRKIN
Administrative Judge

APPEAL OF NATIONAL INSTITUTE FOR COMMUNITY DEVELOPMENT, INC.

IBCA-1185-3-78

Decided *March 28, 1980*

Contract No. 68-01-0422, Environmental Protection Agency.

Denied.

1. Contracts: Construction and Operation: Generally—Contracts: Construction and Operation: Allowable Costs—Contracts: Disputes and Remedies: Burden of Proof

Where a cost-plus-fixed-fee contractor has signed a contract amendment accepting the auditor's recommended overhead rates and no proof is offered to support claims for other disallowed costs, the Board finds there was a binding agreement on overhead rates and a failure to prove appellant's claims for other costs.

APPEARANCES: Mr. Lawrence J. Brailsford, President, National Institute for Community Development, Inc., Arlington, VA., for Appellant; Mr. Donnell L. Nantkes, Government Counsel, Washington, D.C., for the Government.

OPINION BY ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF CONTRACT APPEALS

This is an appeal from the contracting officer's decision to disallow $46,764 of costs under a cost-plus-fixed-fee contract. The appeal is submitted on the record. The appellant having vouchered for and been paid the disallowed costs, the Government is asking for repayment of them.

Background

Appellant was awarded a cost-plus-fixed-fee contract (AF-B)[1] on June 26, 1972, for the design, development, and implementation of an automated data storage and retrival system. The contract contained ceiling overhead rates. The contract was awarded by the Small Business Administration under authority of sec. 8(a) of the Small Business Act (15 U.S.C. § 637(a) (1976)). Appellant apparently is a minority controlled firm. Modifications to the contract resulted in a final estimated cost of $1,241,275 and fixed fee of $101,572 for a total of $1,342,847. Performance was due to be completed in June 1974, but was actually completed in December 1974 (AF-G). After completion of the contract, the audit report (AF-G) questioned costs of $46,764. Of the total, $38,776 were questioned overhead costs which were applicable to disallowed direct costs or exceeded the contract ceiling overhead rates. Modification 10 to the contract incorporated the auditors recommended overhead rates for periods in which the actual rates were less than the ceiling rate and the ceiling rate for periods in which actual rates exceeded the ceiling. Modification 10 was executed by the Government on Mar. 31, 1977, and by appellant on Mar. 29, 1977.

---

[1] All references are to the appeal file.

Appellant filed a notice of appeal of the contracting officer's decision on Feb. 17, 1978. By letter of Apr. 28, 1978, appellant informed the Board of several allegations of Government duress in the award of the contract and of interference and direct negotiations and directives by Government personnel with one of its subcontractors. These two documents constitute the only documentation provided by appellant in support of the appeal.

Discussion and Findings

With regard to the disallowed overhead costs of $38,776, the appellant has not presented any evidence to challenge its acceptance of the final overhead rates established in Modification 10 to the contract. Therefore, we find that Modification 10 was a binding agreement between the parties, whereby the appellant agreed to accept the overhead amounts resulting from application of the agreed upon rates.

Regarding the remainder of the disallowed costs amounting to $7,988, the evidence before the Board is overwhelmingly against appellant. The audit report detailed each questioned cost and the contracting officer found the questioned costs to be unallowable. Appellant offers only two brief letters alleging improprieties in the award and administration of the contract, and protests that the refund of the disallowed costs would put appellant out of business and be inconsistent with the purposes of Federal encouragement of minority contracting programs.

Mere allegations are not proof.[2] Appellant has failed to provide any evidence to support its claim that the costs were improperly disallowed.

---

[2] Oakland Construction Co., Inc., IBCA No. 871-9-70 (Mar. 22, 1971), 71-1 BCA par. 8766, and cases cited therein under n. 14.

Therefore, we find that appellant's claim must fail for want of proof.

Conclusion

[1] Having found a binding agreement between the parties on disputed overhead costs and appellant's failure to prove its claim to other disallowed costs, the appeal is hereby denied.

Russell C. Lynch
Administrative Judge

I Concur

William F. McGraw
Chief Administrative Judge

U. S. GOVERNMENT PRINTING OFFICE : 1980 O - 317-795

OLD BEN COAL CO.

2 IBSMA 38

Decided *April 3, 1980*

Petition for discretionary review by Old Ben Coal Co. from a Nov. 5, 1979, decision by Administrative Law Judge William J. Truswell sustaining a notice of violation and resulting civil penalty assessment issued for violation of the effluent limitations for suspended solids in 30 CFR 715.17(a) (Docket No. IN 9-15-P).

Reversed.

1. Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Specificity

The failure of an OSM inspector to set forth with reasonable specificity in a notice of violation the nature of the alleged violation and the required remedial action will result in a vacation of the notice.

APPEARANCES: Robert J. Araujo, Esq., Chicago, Illinois, for Old Ben Coal Co.; Frank J. Ruswick, Jr., Esq., Mark Squillace, Esq., and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

On Feb. 21, 1979, pursuant to the Surface Mining Control and Reclamation Act of 1977 (Act),[1] inspectors from the Office of Surface Mining Reclamation and Enforcement (OSM) inspected a surface mine in Pike County, Indiana, operated by Old Ben Coal Co. (Old Ben). During that inspection[2] a sample was taken of water flowing from a sedimentation pond, located several hundred feet off the permit area (Tr. 81), into a stream 180 feet below the pond (Tr. 15). The sample was taken at the point the discharge entered the stream (Tr. 13). Laboratory analysis of the sample showed 900 milligrams per liter of suspended solids (Tr. 13), an amount in excess of the limitations imposed by 30 CFR 715.17(a). On Feb. 26, 1979, OSM issued to Old Ben Notice of Violation No. 79-III-12-2 for violation of 30 CFR 715.17(a).[3] On Mar. 21, 1979, OSM issued a proposed civil penalty assessment of $2,500 based on that notice.

Old Ben requested an assessment conference on the proposed civil penalty which was held on May 20, 1979. As a result of that conference, OSM lowered the proposed penalty to $1,000. On June 11, 1979, Old Ben filed a petition for review of the assessment. A hearing was held before Administrative Law Judge William J. Truswell on Aug. 10, 1979. His Nov. 5, 1979, decision sustained both the violation and the penalty assessment.

---

[1] 30 U.S.C. §§ 1201-1328 (Supp. I 1977).

[2] As a result of the inspection, OSM also issued to Old Ben Notice of Violation No. 79-III-12-1 for an alleged violation of 30 CFR 715.16(a) and assessed a civil penalty for that violation. This violation was resolved by stipulation between the parties and is not before the Board.

[3] OSM did not cite Old Ben for mining off the permit area in violation of 30 CFR 710.11(a)(2) and sec. 502(a) of the Act (30 U.S.C. § 1252(a) (Supp. I 1977)) or for failure to pass all surface drainage from the disturbed area through a sedimentation pond or series of sedimentation ponds before leaving the permit area in violation of 30 CFR 715.17(a).

Old Ben petitioned the Board for discretionary review of this decision on Nov. 19, 1979. The Board granted the petition on Nov. 29, 1979, and timely briefs were filed by both parties.

Discussion and Conclusions

OSM charged Old Ben with a violation of 30 CFR 715.17(a). That regulation reads in pertinent part:

> All surface drainage from the disturbed area, * * * shall be passed through a sedimentation pond or a series of sedimentation ponds before leaving the permit area. * * * Discharges from areas disturbed by surface coal mining and reclamation operations must meet all applicable Federal and State laws and regulations and, at a minimum, the following numerical effluent limitation: * * * [total suspended solids—70.0 milligrams per liter].

From the record it appears that OSM was concerned only about the high levels of suspended solids picked up by the discharge after it left the sedimentation pond. As noted by both Old Ben [4] and OSM,[5] this concern appears to be addressed by 30 CFR 715.17(f), which states: "Discharges from sedimentation ponds and diversions shall be controlled, where necessary, using energy dissipators, surge ponds, and other devices to reduce erosion and prevent deepening or enlargement of stream channels and to minimize disturbances to the hydrologic balance." As Old Ben indicated at the hearing and to the Board, the notice of violation it received did not refer to 30 CFR 715.17(f) either by explicit reference or by description of the alleged violation.[6]

[1] OSM urges the Board to hold that 30 CFR 715.17(a) incorporates 30 CFR 715.17(f) by reference and that, through this incorporation, discharges are subject to the specific effluent limitations of sec. 715.17(a) until they reach a point of ultimate dispersion into the natural environment. We cannot agree. The language upon which OSM bases its incorporation-by-reference argument [7] refers to disturbed areas, and the parties have stipulated that the effluent limitations of sec. 715.17(a) were met by the water flowing from the sedimentation pond.[8] The notice of violation, however, only alleges a violation of 30 CFR 715.17(a) and explains that violation as: "Discharge from affected area fails to

---

[4] Petitioner's Br. 10–11.

[5] Respondent's Br. 5–6.

[6] The notice stated:

"Nature of Violation(s): Discharge from affected area fails to meet effluent limitations.

"Provision * * * Violated: 30 CFR 715.17 (a).

"Portion * * * to which Notice Applies: All discharge thru sed. pond next to erection site hill.

"Remedial Action Required: Take appropriate action to limit the discharge of suspended soils [*sic*] and iron so that the effluent limitations are met."

[7] OSM relies on the language of 30 CFR 715.17(a) that says: "Discharges from areas disturbed by surface coal mining and reclamation operations must meet all applicable Federal and State laws and regulations * * *."

[8] Tr. at 74.

meet effluent limitations." There is no clear indication in the notice that OSM was concerned about the effects of the discharge after it left he sedimentation pond; yet that is he nature of the violation sought o be shown at the hearing. We are mable to hold that this notice 'set[s] forth with reasonable speci-icity the nature of the violation and the remedial action required" s mandated by sec. 521(a)(5) of he Act.[9]

The Nov. 5, 1979, decision of the Administrative Law Judge is there-ore reversed and Notice of Viola-ion No. 79-III-12-2 and the esulting civil penalty assessment re vacated.

Will A. Irwin
Chief Administrative Judge

Melvin J. Mirkin
Administrative Judge

PPEAL OF SLATER ELECTRIC CO. OF CALIFORNIA

CA-1283-7-79

Decided *April 7, 1980*

ntract No. 6/07/DC/72080, Central rizona Project.

Sustained.

Contracts: Construction and Opera-n: Changes and Extras—Contracts: nstruction and Operation: Conflict-g Clauses—Contracts: Construction d Operation: Construction Against after

Where the Government modified an invitation for bids by adding a note regarding grouting of equipment to two drawings but failed to change the drawings of circuit breakers to show placement of the grout and failed to change the specifications to require grouting of the circuit breakers, the Board held, under the rule of *contra proferentem* that the contractor's interpretation that the contract did not require grouting of the circuit breakers was reasonable and should prevail. The Government's direction to grout 17 of 21 Government-furnished circuit breakers was a change which entitled the contractor to an equitable adjustment.

APPEARANCES: Thomas W. Eres, Attorney at Law, Kronick, Moskovitz, Tiedman & Girard, Sacramento, California, for Appellant; William A. Perry, Department Counsel, Denver, Colorado, for the Government.

OPINION BY ADMINISTRATIVE JUDGE PACKWOOD

INTERIOR BOARD OF CONTRACT APPEALS

This is a timely appeal from the contracting officer's denial of a claim for additional compensation for costs incurred in grouting 17 circuit breakers at the Davis and Parker Switchyards, Central Arizona Project. Neither party elected a hearing and the appeal is submitted on the record.

Findings of Fact

Contract No. 6/07/DC/72080 was awarded to the Slater Electric Co. of California on Aug. 18, 1976, for construction and completion of the Davis Parker Switchyards for

---

30 U.S.C. § 1271(a)(5) (Supp. I 1977).

the Central Arizona Project, under Specification No. DC-7208 (Appeal File Exh. 1).

The contract called for Slater to install 21 Government-furnished circuit breakers. Four circuit breakers were installed on concrete foundations without grouting. Slater notified the Government that both of the supporting I-beams on a fifth circuit breaker were not fabricated properly and that severe tilting of the I-beams affected the full and even bearing on the concrete foundation (Appeal File Exh. 4).

The Government directed Slater to grout the defective support beams in order to achieve full and even bearing. Further, the Government required grouting of the remaining 16 circuit breakers (Appeal File Exh. 5). There is no evidence of record to show whether there were any defects in the supporting beams of these 16 circuit breakers or whether full and even bearing on the foundations could have been achieved without grouting.

Slater timely notified the Government that its cost for grouting each of the circuit breakers was $531.50. The contracting officer denied Slater's claim for additional compensation for grouting. In denying the claim, the contracting officer relied on Drawing Nos. 391-D-1332 and 231-D-2780A, each of which contained the following note: "Equipment installed on concrete foundations shall be given full and even bearing by being grouted in place as directed."

The note appeared for the first time on revised versions of the drawings furnished with supplement No. 2 to the invitation for bids. Previous versions of the drawings furnished with supplement No. 1 and with the original invitation did not contain such notes. The contracting officer conceded that nothing else in the drawings or specifications referred to grouting the circuit breakers. He relied on clause No. 2 of the General Provisions, Specifications and Drawings, which provides: "Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications, shall be of like effect as if shown or mentioned in both."

Pursuant to the above clause, the contracting officer determined that it was not necessary for the grouting requirement to be in both the specifications and the drawings in order to be a contract requirement.

Slater, on the other hand, interpreted the notes as applying only to those installations of equipment where a layer of grout was shown on the drawings or set forth in the text of the specifications.

Decision

[1] When the notes regarding grouting were added to the two drawings, there was no accompanying change in the drawings of the circuit breakers to show the addition of a layer of grout between the supporting beams and the concrete foundations and no change in the specifications. If the Government had truly intended to impose a new

requirement for grouting circuit breakers at a potential additional cost of more than $11,000, it does not appear reasonable that it would have done so in such a casual manner.

The Government's reliance on clause No. 2 of the General Provisions rests on its belief that the requirement was shown on the drawings. Slater regarded the notes as "boilerplate" and, in the absence of any other mention in the specifications or showing in the drawings, concluded that the notes applied only to equipment which had a grouting requirement spelled out or shown somewhere else in the contract. Under the rule of *contra proferentem*,[1] we find that Slater's interpretation is reasonable and is entitled to prevail.

Consequently, the Government's direction to grout 17 circuit breakers was a change for which Slater is entitled to an equitable adjustment. The Government has offered no evidence to show that Slater's costs of $531.50 per circuit breaker for grouting are unreasonable. The Board finds that Slater is entitled to an equitable adjustment of $9,035.50 (17 × $531.50).

G. Herbert Packwood
Administrative Judge

I concur:

William F. McGraw
Chief Administrative Judge

---

[1] *Commonwealth Electric Co.*, IBCA–1048–11-74 (Sept. 30, 1977), 84 I.D. 867, 77–2 BCA par. 12,781.

APPEAL OF TANACROSS, INC.

4 ANCAB 173

Decided *April 7, 1980*

Appeal from decision of Bureau of Land Management (BLM) F–14943–B.

Affirmed.

1. Alaska Native Claims Settlement Act: Definitions: Withdrawal for National Defense Purposes

The phrase "national defense purposes" is not a term of art and does not have a precise legal meaning, but is a broadly inclusive descriptive term.

2. Alaska Native Claims Settlement Act: Definitions: Withdrawal for National Defense Purposes

Where neither the express language, nor the legislative history of ANCSA draws any distinction between withdrawals "for national defense purposes" and withdrawals for military reservations or other military uses, a withdrawal for use of the Department of the Army for terminal facilities in connection with a petroleum products pipeline system is considered to be a withdrawal "for national defense purposes" within the meaning of § 11(a)(1) of ANCSA.

3. Alaska Native Claims Settlement Act: Definitions: Withdrawal for National Defense Purposes—Withdrawals and Reservations: Revocation and Restoration

In determining whether a national defense withdrawal, within the meaning of § 11(a)(1) of ANCSA, existed on Dec. 18, 1971, only the formal legal status of the withdrawal may be considered, and it is immaterial whether the purpose of the withdrawal has been fulfilled or whether the actual use to which the land is put has changed.

4. Alaska Native Claims Settlement Act: Definitions: Withdrawal for National Defense Purposes

ANCSA does not give the Secretary of the Interior the authority to make factual determinations as to the actual use of land which is withdrawn for national defense purposes, resulting in removal of such land from the protection of the exception for national defense purpose withdrawals in § 11(a)(1) of ANCSA.

5. Withdrawals and Reservations: Revocation and Restoration

The Army's filing of a notice of intent to relinquish certain property cannot revoke a national defense withdrawal because the Army lacks the authority to revoke such withdrawals.

6. Withdrawals and Reservations: Revocation and Restoration

A notice of intent to relinquish property is not a relinquishment but a method by which an agency of the Federal Government expresses the intention to relinquish the property at a future time, upon completion of required statutory and regulatory procedures.

7. Withdrawals and Reservations: Revocation and Restoration

The issue of whether ANCSA supercedes certain provisions of the Federal Property and Administrative Services Act, as regards administrative actions taken concerning a specific withdrawal, is rendered moot by a finding that the withdrawn lands were never available for selection under ANCSA. When a notice of intention to relinquish affects lands not withdrawn pursuant to ANCSA, BLM is required to follow the provisions of the Federal Property and Administrative Services Act, and the regulations promulgated under that Act.

8. Applications and Entries: Generally

Having determined that the lands in question were withdrawn for national defense purposes during the selection period, BLM was required to reject appellant's selection application for such lands pursuant to regulations in 43 CFR 2091.1.

APPEARANCES: Douglas Paul Elliott, Esq., Goldberg & Elliott, and James B. Gottstein, Esq., Goldberg, Breckberg & Gottstein, for appellant; Bruce E. Schultheis, Esq., and M. Francis Neville, Esq., Office of the Regional Solicitor, Alaska, U.S. Department of the Interior, for the Bureau of Land Management.

OPINION BY ALASKA NATIVE CLAIMS APPEAL BOARD

SUMMARY OF APPEAL

Tanacross, Inc. appeals BLM's rejection of their selection of lands within a withdrawal, for the Department of the Army, for terminal facilities which are part of the Haines-Fairbanks petroleum pipeline system. BLM's grounds for rejection were that the lands were withdrawn for national defense purposes and, under § 11(a)(1) of ANCSA, were therefore not withdrawn for Native selection and could not be selected by Tanacross.

Tanacross contends that the lands, although withdrawn for a military use, were not withdrawn "for national defense purposes" within the meaning of the exception in § 11(a)(1); furthermore, even if the withdrawal was originally for national defense purposes, it had been changed in character before the end of the selection period by acts of relinquishment on the part of the Army and the withdrawn lands should, therefore, have been made available for selection by Tanacross.

The Board finds that (1) the lands in question were withdrawn for national defense purposes within the meaning of the exception in § 11(a)(1); (2) the lands remained withdrawn for national defense purposes at all relevant times through the end of the selection period and therefore were not withdrawn for Native selection; and (3) BLM did not violate applicable statutes and regulations in its handling and rejection of this portion of the Tanacross selection.

JURISDICTION

The Alaska Native Claims Appeal Board, pursuant to delegation of authority to administer the Alaska Native Claims Settlement Act, 85 Stat. 688, *as amended*, 43 U.S.C. §§ 1601–1628 (1976 and Supp. I 1977), and the implementing regulations in 43 CFR Part 2650 and 43 CFR Part 4, Subpart J, hereby makes the following findings, conclusions and decision.

PROCEDURAL BACKGROUND

On Dec. 9, 1974, Tanacross, Inc. (Tanacross) filed selection application F–14943–B pursuant to § 12(a) of the Alaska Native Claims Settlement Act (ANCSA) (85 Stat. 688, 701; 43 U.S.C. §§ 1601–1627 (1976)). On Dec. 18, 1974, the application was amended to include "all lands within PLO 1887," in T. 18 N., Rs. 11 and 12 E., Copper River meridian.

On June 13, 1978, BLM rejected Tanacross selection application with respect to Tok Pumping Station No. 3 (also referred to as Tok terminal facilities) on the basis that those lands were withdrawn for national defense purposes and as such could not be selected under ANCSA.

On July 17, 1978, Tanacross filed its Notice of Appeal with the Alaska Native Claims Appeal Board (Board) in accordance with the regulations found in 43 CFR 4.900–4.913 (1979). This notice was followed on Nov. 13, 1978, by a Statement of Reasons and a Memorandum in Support of its Statement of Reasons.

On Dec. 20, 1978, the Board issued an order naming the General Services Administration (GSA) as a necessary party to this appeal and giving that agency 30 days within which to respond to briefings filed by the parties. The GSA has never responded to the Board's order.

The Board, on June 15, 1979, issued an order directing oral argument and simultaneous briefing of the issues. BLM filed its brief in response to this order on July 18, 1979. Tanacross filed its response on July 20, 1979. The Board heard oral argument on July 24, 1979.

Briefing was concluded and the record was closed when BLM filed its Supplemental Brief on Sept. 11, 1979, and Tanacross submitted its Reply Brief on Sept. 21, 1979.

FACTUAL BACKGROUND

The record indicates that the following events have taken place:

The United States and Canada entered into an agreement on June 30, 1953 (4 U.S.T. 2223 (1953); T.I.A.S. No. 2875), (U.S.-Canada Agreement), which authorized the construction of an oil pipeline system from Haines to Fairbanks, Alaska, passing through northwestern British Columbia and Yukon Territory. The purpose of the agreement was to maintain the pipeline system until such time as the permanent Joint Board on Defense decided that there was no further need for the system. (This decision was finally made by the Joint Board on Defense in October of 1978.)

On June 26, 1959, Public Land Order (PLO) 1887 (Fairbanks 014031) withdrew 202.35 acres of land in the Tanacross area for use by the Department of the Army for the Tok terminal facilities used in connection with the Haines-Fairbanks Products Pipeline System, as authorized by the Act of Sept. 28, 1951 (65 Stat. 336). The Tok terminal facilities consist of 20 buildings, water and fuel storage tanks, utility systems, truck loading facilities, roads, fences, dykes and dams, and vehicle parking areas.

With the enactment of ANCSA on Dec. 18, 1971, certain public lands were withdrawn in Alaska for selection by Native village corporations established under the Act. Sec. 11(a)(1) provides:

> *The following public lands are withdrawn*, subject to valid existing rights, from all forms of appropriation under the public land laws, including the mining and mineral leasing laws, and from selection under the Alaska Statehood Act, as amended:
>
> (A) The lands in each township that encloses all or part of any Native village identified pursuant to subsection (b);
>
> (B) The lands in each township that is contiguous to or corners on the township that encloses all or part of such Native village; and
>
> (C) The lands in each township that is contiguous to or corners on a township containing lands withdrawn by paragraph (B) of this subsection.
>
> *The following lands are excepted from such withdrawal:* lands in the National Park System and *lands withdrawn or reserved for national defense purposes* other than Naval Petroleum Reserve Numbered 4. [Italics added.]

The relevant definition of "public lands" is contained in § 3(e):

> "Public lands" means all Federal lands and interests therein located in Alaska except: (1) the smallest practicable tract, as determined by the Secretary, enclosing land actually used in connection with the administration of any Federal installations.

Sec. 12(a)(1) places a limit on the time within which the village corporations could make their selection applications and designates the lands from which selections could be made.

> *During a period of three years from the date of enactment of this Act, the Village Corporation* for each Native village identified pursuant to section 11 *shall select*, in accordance with rules established by the Secretary, all of the township or townships in which any part of the village is located, plus an area that will make the total selection equal to the acreage to which the village is entitled under section

14. The selection shall be made from lands withdrawn by subsection 11(a). [Italics added.]

In May of 1970, the Department of the Army determined that the pipeline system was no longer needed.

On June 17, 1971, the Assistant Secretary for the Department of Defense made the decision to declare the pipeline system excess.

The House Armed Services Committee approved this decision on Mar. 13, 1973.

On June 7, 1973, the Army through the Real Estate Division of the Alaska District, Corps of Engineers, filed a Preliminary Report of Excess concerning disposal of the system.

In August of 1973, the Army filed with BLM a notice of intention to relinquish the military withdrawal here in question.

On Feb. 14, 1974, the Department of the Interior and the General Services Administration entered into an agreement (hereinafter DOI/GSA Agreement). This agreement established procedures for processing certain categories of property in Alaska for possible selection under ANCSA, including real property determined surplus to all Federal agency needs, withdrawn public domain lands for which the holding agency has filed a notice of intention to relinquish, and real property reported to GSA as excess by the holding agency.

On Sept. 24, 1974, a Restoration and Revocation report was issued by BLM which concluded that because of the improvements on the property it was unsuitable for return to the public domain. On the basis of this Restoration and Revocation report, BLM authorized the Army to report the property to GSA as excess on Nov. 12, 1974, and on Nov. 21, 1974, the Army sent GSA its final report of excess.

On Dec. 18, 1974, the deadline under ANCSA § 12(a)(1) for filing of village selections, Tanacross amended its selection application to include the lands withdrawn by PLO 1887.

On Mar. 23, 1976, BLM wrote to GSA informing GSA that because of the selection by Tanacross, the property should be transferred to BLM for conveyance to the village corporation. An Apr. 15, 1976, GSA responded that the Tok terminal was not available for Native selection because the property was to remain in Federal ownership.

On June 13, 1978, the BLM issued its decision rejecting the selection of the lands in question stating that "as of December 18, 1974, * * * the lands at Tok Pumping Station No. 3 remained withdrawn for the military and were therefore unavailable for selection."

DECISION

This appeal raises three questions of law: First, were the lands in question "public lands" withdrawn for village selection pursuant to § 11(a)(1) on Dec. 18, 1971, or were they "lands withdrawn or reserved for national defense purposes" and thus excluded from such withdrawal? Second, if the lands were not withdrawn for village selection on Dec. 18, 1971, did anything legally transpire in the subsequent three years to make the land available for village selection? Third, did BLM follow the appropriate statutes, rules and regulations and other procedures in administering the lands withdrawn by PLO 1887?

The Board has reviewed and considered the facts and legal contentions of the parties which comprise the record in this appeal, and finds that: (1) the lands withdrawn by PLO 1887 on June 26, 1959, were withdrawn for national defense purposes within the meaning of § 11(a)(1) of ANCSA; and (2) the lands in question were still withdrawn for national defense purposes on Dec. 18, 1971, and therefore they were not withdrawn for Native village selection under § 11(a)(1) of ANCSA; further, nothing occurred between Dec. 18, 1971, and the deadline for the filing of village selection applications (Dec. 18, 1974) which legally or factually altered the national defense status of the lands withdrawn by PLO 1887, and as a result those lands were not subject to village selection. As to the third issue, BLM did not violate applicable statutes, regulations and agreements, thereby unlawfully denying appellant its selection rights under § 11(a)(1) of ANCSA, and therefore, because the lands withdrawn by PLO 1887 were not available for village selection on the deadline for filing an application for such selections, BLM could have taken no course of action but to reject the application. On the basis of these findings, the Board hereby affirms BLM's decision of June 13, 1978.

Withdrawal for National Defense Purposes

Sec. 11(a)(1) of ANCSA withdrew certain public lands surrounding a Native village for selection and eventual ownership by the village. Excepted from such withdrawal are "lands withdrawn or reserved for national defense purposes." Within the area to have been selected by appellant under § 11(a)(1) were 202.35 acres of land which had been reserved by PLO 1887 on June 26, 1959, "for use of the Department of the Army for terminal facilities used in connection with the Haines-Fairbanks Products Pipeline System, as authorized by the act of September 28, 1951 (65 Stat. 336)."

It must first be determined whether PLO 1887, in 1959, created a withdrawal or reservation for national defense purposes within the meaning of the exception above. A finding that no such withdrawal was in fact created would be dispositive of this appeal.

Referring to the express language of PLO 1887, appellant asserts that nowhere does such language indicate that the land was "withdrawn or reserved for national defense purposes." PLO 1887 reads, in pertinent part:

> 1. Subject to valid existing rights, the following described public lands in Alaska are hereby withdrawn from all forms of appropriation under the public land laws, including the mining and mineral leasing laws, but not disposals of materials under the Act of July 31, 1947 (61 Stat. 681; 30 U.S.C. 601-604), as amended, and *reserved for use of the Department of the Army* for terminal facilities in connection with the Haines-Fairbanks Products Pipeline System, as authorized by the act of September 28, 1951 (65 Stat. 336). [Italics added.]

Taking the contrary position, BLM asserts that a reservation "for use of the Department of the Army" is a military withdrawal and Congress in ANCSA did not distinguish between "military" and "national defense" withdrawals. As additional support for its contention that PLO 1887 was a withdrawal for national defense purposes, BLM points out that this withdrawal was made pursuant to an agreement between the United States and Canada which was entered into for the mutual defense interests of both countries.

The Board concludes that PLO 1887 established a withdrawal for national defense purposes within the exception in § 11(a)(1) of ANCSA.

[1] The phrase "national defense purposes" is not a term of art, and does not have a precise legal meaning. It is a broadly inclusive descriptive term. Neither the express language of ANCSA, nor the legislative history of the Act, draws any distinctions between withdrawals for "national defense purposes" and withdrawals used to create military reservations, in the sense of Air Force bases or Army posts, or to reserve lands for other military uses.

PLO 1887, typically, was withdrawn under the statutory authority of the General Withdrawal Act of June 25, 1910 (the Pickett Act), which authorized the President to "temporarily withdraw from settlement, location, sale, or entry any of the public lands * * * and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes." (36 Stat. 847, 43 U.S.C. § 141 (1970) (repealed by P.L. 94-579, title VII, § 704(a) Oct. 21, 1976, 90 Stat. 2744, 2792).) While this listing of public purposes for withdrawals does not expressly include military uses, Pickett Act withdrawals have frequently been used to create military reservations. In determining whether the Army had authority to grant an easement over lands withdrawn for the military, the Interior Board of Land Appeals dealt with a withdrawal made under both the Pickett Act, and the inherent Presidential authority to create permanent withdrawals. Pointing out that the executive order authorizing the withdrawal in question referred to both the President's inherent and his statutory Pickett Act authority, IBLA commented, "The Pickett Act, *supra*, also granted authority to the President to withdraw land for military purposes." (*Alaska Pipeline Co.*, 38 IBLA 1, 12 (1978).)

Before the enactment of ANCSA, Congress was well aware of the existence of military withdrawals in Alaska. However, discussion of the term "national defense purposes," as used in various bills preceding ANCSA, never distinguished this term from other military uses. Concern focused, instead, on whether lands used by the military without benefit of formal withdrawal would be protected from Native selection. To this end, it was suggested that the exception protecting "lands withdrawn for national defense purposes" be changed to read "lands withdrawn *or otherwise reserved* for national defense."

Thus, commenting on the exception in a letter dated Aug. 2, 1969, to the Chairman of the Senate Committee on Interior and Insular Affairs, Phillip N. Whittaker, Assistant Secretary for the Air Force, Installations and Logistics, stated:

> *The Department of Defense has numerous military installations throughout Alaska located on public lands that have been withdrawn, reserved, or otherwise restricted from further appropriation under the public land laws. It is necessary that the integrity of these lands be preserved in the interest of national defense. The exception in section 8(a)(1) with respect to lands withdrawn for national defense purposes other than petroleum reserve numbered 4 would appear to recognize this interest.* However, in order to assure that public lands used for defense purposes by means other than withdrawal, such as by special use permit or notation on the public land records, are also excepted, it is suggested that line 11, page 16, be revised to read, "State of Alaska, except lands withdrawn or otherwise reserved for national defense." Paragraph (2) of section 8(a) should also be revised by the insertion of "withdrawn or otherwise reserved for national defense" as between "lands" and "described" in line 8 of page 25 of the bill. (Hearings on H.R. 13142 and H.R. 10193 before the Subcomm. on Indian Affairs, House Comm. on Interior and Insular Affairs, 91st Cong., 1st Sess., Part 1, 47, 48 (1969).) [Italics added.]

Thus, referring to "numerous military installations throughout Alaska located on public lands that have been withdrawn," Mr. Whittaker cited a need to preserve the integrity of these lands, "in the interest of national defense," and believed that an exception with respect to lands withdrawn "for national defense purposes" recognized this interest. There is no indication that Congress thought otherwise. Certainly nothing in the legislative history or the language of ANCSA indicates any effort or intention to create a class of lands withdrawn "for national defense purposes," as separate and distinct from other lands withdrawn for use by the military services. Since the purpose of the military forces, by definition, is national defense, such distinctions would be difficult to make. In the total absence of statutory or regulatory guidelines, the Board believes it unreasonable to try to make them.

[2] Where neither the express language, nor the legislative history of ANCSA draws any distinction between withdrawals "for national defense purposes" and withdrawals for military reservations

or other military uses, a withdrawal for use of the Department of the Army for terminal facilities in connection with a petroleum products pipeline system is considered to be a withdrawal "for national defense purposes" within the meaning of § 11(a)(1) of ANCSA.

The Board also considered the relationship of the joint defense agreement between the United States and Canada with PLO 1887.

Paragraph 1 of the United States note proposing the agreement states:

> I have the honor to refer to discussions which have taken place in the Permanent Joint Board on Defense, and subsequently between representatives of our Governments concerning a proposal for an oil pipeline installation from Haines to Fairbanks, Alaska, passing through northwestern British Columbia and Yukon Territory, to be constructed, owned and operated by the Government of the United States of America *in the mutual defense interest of both countries.* [Italics added.]

In paragraph 5 of the Annex to the above-quoted note, the United States agreed "to give assurance of equal consideration to Canadian defense requirements with those of the United States." Paragraph 3 of the Annex reads, in part, as follows: "It is mutually agreed that the common *defense interests* of the two countries will require continuance of the pipeline for a minimum period of twenty years." [Italics added.]

PLO 1887 was issued as a result of this agreement.

The Board concludes that the existence of the 1953 joint defense agreement between the United States and Canada lends additional support to the characterization of PLO 1887 as a withdrawal "for national defense purposes" within the meaning of the exception in § 11(a)(1) of ANCSA.

Withdrawal Status During Selection Period

The second issue is whether the lands in question remained withdrawn for national defense purposes on Dec. 18, 1971, and at all times during the selection period provided by ANCSA, or whether events occurred which changed the status of the land withdrawal and made the lands available for selection before the expiration of the selection period.

First, the Board considers events prior to the passage of ANCSA, and finds that the lands in question remained withdrawn for national defense purposes on the date of enactment of the Act, Dec. 18, 1971.

The appellant asserts that the Secretary of the Interior had authority under the Pickett Act, *supra*, through delegations in Executive Order No. 10355, 17 FR 4831 (1952) to revoke PLO 1887. The appellant asserts that the Secretary should have done so, because a series of events changed the character of the land withdrawal and made it appropriate to classify the lands as available for Native selection under ANCSA.

Events on which the appellant relies for this contention are: the determination by the Army in May of 1970, that the pipeline was no longer required for its needs; the decision by the Assistant Secretary of Defense, in June of 1971, to declare the entire system excess; the preliminary report of excess in June of 1973; and the transfer of jurisdiction over the land to GSA in November of 1974. Of these events two—the Army's 1970 determination and the Defense Department's 1971 decision to excess—occurred before the enactment of ANCSA on Dec. 18, 1971, upon which date the statutory withdrawals of land for Native selection, mandated by § 11(a)(1), took place.

The Board disagrees with the appellant's contentions because they run contrary to the essential nature of national defense withdrawals and the intent of ANCSA.

As has been discussed, the authority for withdrawals for national defense and other public purposes is the Pickett Act, *supra*. The President's authority under this Act was delegated to the Secretary by Executive Order No. 10355, 17 FR 4831 (1952). Sec. 141 of 43 U.S.C. (1970) (Pickett Act) not only sets out the procedure for establishing withdrawals but also specifically and unambiguously provides how such withdrawals are to be terminated.

> The President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States, including Alaska, and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, *and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress.* [Italics added.]

It appears clear from a reading of this statutory provision that a withdrawal can only be revoked by the Secretary or by Congress and not by a change in the actual use or even nonuse of the withdrawal. In support of this position, the Board looks to *Alaska Pipeline Co.*, 38 IBLA 1 (1978) in which BLM unsuccessfully argued *inter alia* that the relinquishment of jurisdiction by the Army and acceptance of jurisdiction by BLM of lands withdrawn pursuant to Executive Order No. 10355 constituted a revocation of that withdrawal. The Interior Board of Land Appeals stated:

> We note initially that E.O. 10355, which was effectively revoked by section 704(a) of FLPMA, 90 Stat. 2792, provides, in relevant part, that the Secretary of the Interior is delegated the full withdrawal authority of the President emanating from both the Pickett Act and the President's inherent authority: "including the authority to modify or revoke withdrawals and reservations of such lands heretofore or hereafter made." It further provides that: "All orders issued by the Secretary of the Interior under the authority of this order shall be designated as public land orders and shall be submitted * * * for publication in the Federal Register." *Nothing in this Executive Order, however, impels the conclusion that the relinquishment of jurisdiction over land withdrawn constituted a revocation of the withdrawal. In point of fact, it did not. The withdrawal, itself, remained in effect unless it was revoked in accordance with the pro-*

> *cedures outlined in E.O. 10355.* [Italics added.]

38 IBLA at 17.

The Department of the Interior has consistently affirmed the position that a withdrawal remains in effect until revoked, even though the purpose of the withdrawal has been fulfilled. (*See, e.g., Oliver and Robert A. Reese, Silver Associates, Inc.*, 4 IBLA 261, 265 (1972); *Grace Kinsela*, 74 I.D. 386 (1967).) Further, it has been established that actual use of withdrawn lands is immaterial to the legal status of the lands under the withdrawal. As ated in *David W. Harper, et al.*, 74 I.D. 141, at 142, 149 (1967):

> Lands which have been withdrawn rom entry under some or all of the pub-
> lc land laws remain so withdrawn until he revocation or modification of the rder of withdrawal, and *it is immaterial chether the lands are presently being, or ave ever been, used for the purpose for hich they were withdrawn.* [Italics dded.]

ee, e.g., United States v. Milton Vichner, 35 IBLA 240 (1978); *ohn C. Amonson*, 8 IBLA 346 1972). Even in cases where a withrawal should have been revoked ut was not because of an adminisative oversight, the legal status of e withdrawal is not altered. In *nneco Oil Co.*, 8 IBLA 282, 283-4 (1972), the Board stated:

> that as it may, the consistent position this Department has been that lands ich are withdrawn from entry under ne or all of the public land laws rein so withdrawn until there is a mal revocation or modification of the ler of withdrawal. The mere passage of time or the accomplishment of an avowed purpose cannot serve as a substitute for the formal restoration.

[3] From this analysis of the Pickett Act and related Departmental decisions, the Board finds that in determining whether a national defense withdrawal exists as of Dec. 18, 1971, within the meaning **of § 11(a)(1) of ANCSA, BLM** must consider only the formal legal status of the withdrawal and it is immaterial whether the purpose of the withdrawal has been fulfilled or the actual use to which the land has been put has changed.

ANCSA, in § 3(e), gives the Secretary broad authority to determine what lands, other than national defense purpose withdrawals, were excluded from the withdrawal for Native selection made by § 11(a)(1) on the grounds that they were "actually used in connection with the administration of any Federal installation" and, therefore, were not "public lands" as defined by § 3(e). In contrast, § 11(a)(1) simply states that withdrawals "for national defense purposes" are excluded from the general withdrawal for village selections. No standards or procedures are established for the Secretary of the Interior—or any other official—to determine whether all lands within withdrawals for national defense purposes are "actually used" for such purposes.

[4] By virtue of this distinction, the Board finds that ANCSA does not give the Secretary of the Interior authority to make factual de-

terminations as to the actual use of land which is withdrawn for national defense purposes, resulting in removal of such land from the protection of the exception in § 11(a)(1).

It has been argued that even if the lands in question were not withdrawn on Dec. 18, 1971, for village selection, events occurred prior to Dec. 18, 1974, which changed the legal status of the withdrawal thereby making the lands available for selection. The appellant here relies on the preliminary report of excess, issued in June of 1973, the Notice of Intent to Relinquish issued in August of 1973, and the transfer of jurisdiction over the lands to GSA in November of 1974. Based on its review of the process by which withdrawals are revoked and the process, further, by which the Federal Government can surplus or relinquish ownership of property, the Board concludes that nothing occurred which altered the legal status of the lands withdrawn by PLO 1887 as a reservation or withdrawal for national defense purposes between Dec. 18, 1971, and Dec. 18, 1974.

[5] The Army's initiation of the relinquishment process by filing a notice of intention to relinquish certain property cannot revoke a national defense withdrawal because the Army lacks the authority to revoke such withdrawals. The Pickett Act provides that withdrawals "shall remain in force until revoked by him [Secretary of the Interior] or by an Act of Congress."

[6] A notice of intention to relinquish does not automatically revoke a withdrawal. The regulations set forth in 43 CFR Part 2370 make it clear that the notice is merely the first step of a process whereby a Federal agency can relinquish lands withdrawn or reserved for its use. (*See* 43 CFR 2372.1, 2372.2, and 2374.2.) A notice of intention to relinquish property is not a final action but a method by which an intention is expressed by one agency of the Federal Government to relinquish at a future time upon the completion of certain statutory and regulatory procedures.

It has been argued that even if the lands in question were excluded from the general § 11(a)(1) withdrawal on Dec. 18, 1971, because they were withdrawn for national defense purposes on that date, nevertheless, the Secretary had authority to withdraw the lands for Native selection at a later date if the withdrawal for national defense purposes were revoked.

However, the Board does not rule on this issue because the lands in question remained withdrawn for national defense purposes through the close of the selection period.

BLM Procedure

The third principal issue to be addressed is whether BLM erred by failing to follow the applicable statutes, regulations, and an agreement with another Federal entity, and thereby unlawfully denied the appellant its selection rights.

Appellant argues that BLM erred in administering these lands pursuant to the Federal Property and Administrative Services Act, *as amended* (63 Stat. 378; 40 U.S.C. § 471 *et seq.* (1976)), because it was superseded by the general intent of ANCSA. ANCSA, it is asserted, gives village applications priority over any appropriation of Federal land and so when the notice of intent to relinquish was filed by the Army, BLM should have declared the lands available for selection by appellant.

It is argued that BLM was required by its own regulations (43 CFR 2372.3 and 2374.1) to make a determination as to whether or not the lands in question were suitable for return to the public domain and BLM failed to make such a determination.

Further, the appellant contends that BLM unlawfully denied its selection rights by failing to follow the DOI/GSA Agreement. Appellant refers to part of Sec. II.c.(1) of this agreement which reads:

> c. As soon as practicable after receipt of notification of the availability of surplus acquired land, the Department of the Interior will make a determination as to whether or not the land may be subject to selection under the Settlement Act.
>
> (1) Where it is determined that the land may be subject to selection, the Department will file a request for transfer of the property with the appropriate GSA Office in the following circumstances:
>
> (a) Where the land is within a Section 11(a)(1) withdrawal.

Appellant argues that because the notice of intent to relinquish had been filed, the lands in question became surplus and the provisions of the DOI/GSA Agreement applied. Further, appellant takes the position that this DOI/GSA Agreement established and improper preference in Federal agencies to take excess property before it was offered to Native corporations for selection. Appellant cites the report by the Comptroller General of the United States issued June 21, 1978, wherein the Comptroller addressed the issue of reported excess lands:

> ***REPORTED EXCESS LAND NOT OFFERED TO NATIVES***
>
> The General Services Administration (GSA) and the Bureau are responsible for disposing of unused property voluntarily declared excess by Federal agencies. When such excess is not suitable for return to public domain, it is offered to other Federal agencies, and if there is no further Federal need, it is offered to a variety of non-Federal groups in accordance with existing laws and regulations. *After the act was passed, the Secretary did not arrange to modify this process to include the Native corporations' rights to such unused lands under the act . . .*
>
> We told Interior officials that the agreement giving Federal agencies priority over Native Corporations was not proper, and we suggested that Native corporations be provided first priority to excess Federal lands within their selection area. *Department officials agreed with our view*, but as of March 1978 no action had been taken to (1) define Native corporation rights to unused agency land and include these rights in the Federal property disposal procedures or (2) identify and reinstate as public land all property disposals that

> were made in violation of the Native corporation rights as so defined.

Appellant's Memorandum in Support of its Statement of Reasons, p. 13.

With respect to these three arguments raised by appellant, BLM counters that it did, in fact, follow all steps required under applicable law, rules and regulations and other procedures in administering the lands here in controversy. The Board agrees.

[7] The issue of whether ANCSA supersedes certain provisions of the Federal Property and Administrative Services Act, *supra*, as regards administrative actions taken concerning a specific withdrawal is rendered moot by a finding that the withdrawn lands were never available for selection under ANCSA. When a notice of intention to relinquish affects lands not withdrawn pursuant to ANCSA, BLM is required to follow the provisions of the Federal Property and Administrative Services Act, *supra*, and the regulations promulgated under that Act.

These statutory and regulatory provisions require that a number of steps be taken by the Federal Government before its property can be transferred to outside interests. Basically, BLM was required to first make a field examination of the lands to ascertain whether the lands were suitable for return to the public domain (43 CFR 2372.3 and 2374.1). Because BLM found the lands were unsuitable for return to the public domain because of the improvements made on the lands, BLM was required to notify the Army to report the lands and improvements to GSA as excess property (43 CFR 2374.1(c)). The record reveals that these steps were appropriately taken.

Appellant strongly argues that the Secretary of the Interior has, in numerous instances, been able to revoke national defense withdrawals and thereafter has withdrawn those same lands for Native selection. BLM contends, and again the Board concurs, that there is a significant distinction between those instances and the case here on appeal. The distinction rests in the fact that before the Secretary can revoke such a withdrawal, one of two events must occur and, under the facts of this case, neither of the necessary events transpired. Basically, before the Secretary can take withdrawal action, BLM must either determine that the lands are suitable for return to the public domain or, if the BLM finds them to be unsuitable, then GSA must determine that the lands are "surplus" property and transfer them to BLM. In either of these situations a Federal withdrawal could be revoked by the Secretary and he could simultaneously withdraw the lands for Native selection. However, in this case, the record reveals that BLM found the lands to be unsuitable for return to the public domain, GSA did not determine they were surplus within the selection period, and therefore, BLM could not revoke the withdrawal.

When a notice of intention to relinquish a national defense withdrawal has been filed, BLM subsequently determines that the lands are not suitable for return to the public domain and GSA does not determine the lands to be "surplus property," the Secretary of the Interior lacks authority to revoke the national defense withdrawal. Any questions involving the Secretary's authority to simultaneously withdraw those lands for Native selection pursuant to ANCSA are therefore moot and the Board does not rule on such issues.

Appellant strenuously argues that because the lands withdrawn by PLO 1887 were determined to be excess they became available under the terms of the DOI/GSA Agreement for village selection. The language here relied on is found in Sec. II.c.(1) and provides, in pertinent part:

> c. As soon as practicable after receipt of notification of the availability of *surplus* acquired land, the Department of the Interior will make a determination as to whether or not the land may be subject to selection under the Settlement Act.
>
> (1) Where it is determined that the land may be subject to selection, the Department will file a request for transfer of the property with the appropriate GSA Office in the following circumstances:
>
> (a) Where the land is within a Section 11(a)(1) withdrawal. [Italics added.]

The Board finds first that the property withdrawn by PLO 1887 was not surplus property under the terms of the DOI/GSA Agreement at any time during the selection period and therefore BLM did not act in such a way as to violate that agreement. Before the above-quoted provision would become applicable, GSA first had to make the determination that the lands were "surplus" and not required for any Federal Government needs. In this particular case GSA never made the necessary surplus determination during the selection period and, therefore, the lands never became subject to Sec. II.c.(1) of the DOI/GSA Agreement.

[8] Having determined that the lands in question were withdrawn for national defense purposes during the selection period, BLM was required to reject appellant's selection applications for such lands pursuant to regulations in 43 CFR 2091.1, which provide in pertinent part:

> Rejection of applications.
>
> Except where regulations provide otherwise, all applications must be accepted for filing. However, applications which are accepted for filing *must be rejected and cannot be held pending possible future availability of the land* or interests in land, when approval of the application is prevented by:
>
> (a) Withdrawal or reservation of lands: *except* that this does not prevent the filing of applications by village and regional corporations under 43 CFR Parts 2561 and 2652 for public lands withdrawn under section 11(a)(1) of the Alaska Native Claims Settlement Act (43 U.S.C. 1601), *unless the lands are withdrawn for the national park system or are withdrawn or reserved for national defense purposes.* [Italics added.]

Since the lands in question were not withdrawn for selection by § 11(a)

(1) of ANCSA and were not otherwise made available prior to Dec. 18, 1974, through a public land order revoking PLO 1887 and withdrawing the lands for selection by appellant, 43 CFR 2091.1 required BLM to reject the selection application.

Finally, the Board has considered appellant's argument that because BLM had full authority to make the lands in question available for selection but failed to do so, there rests an equitable claim in the appellant for these lands. The Board disagrees. Such a claim can be recognized only if the governmental conduct complained of amounts to "affirmative misconduct." *United States* v. *Ruby Co.*, 588 F.2d 697, 703–4 (9th Cir. 1978). The Board does not find the Government's conduct in this case amounting to affirmative misconduct. *Cf. United States Immigration & Naturalization Service* v. *Hibi*, 414 U.S. 5 (1973); *See also Simon* v. *Califano*, 593 F.2d 121 (9th Cir. 1979).

Therefore, BLM's Decision F-14943-B rejecting selection by Tanacross, Inc. of lands within PLO 1887 is hereby affirmed.

This represents a unanimous decision of the Board.

Judith M. Brady
Administrative Judge

Abigail F. Dunning
Administrative Judge

Joseph A. Baldwin
Administrative Judge

DANIEL BROTHERS COAL CO.

2 IBSMA 45

Decided *April 10, 1980*

Appeal by Daniel Brothers Coal Co. from a Mar. 18, 1980, decision of Administrative Law Judge David Torbett sustaining Notice of Violation 79-II-92-5 and denying Daniel Brothers' application for temporary relief (Docket No. NX 0-102-R).

Affirmed.

1. Statutes—Surface Mining Control and Reclamation Act of 1977: Variances and Exemptions: Generally

One seeking an exemption from the coverage of a statute, especially a statute whose purpose is corrective, must affirmatively demonstrate entitlement to that treatment.

2. Estoppel—Surface Mining Control and Reclamation Act of 1977: Small Operators

A party seeking to estop the Office of Surface Mining Reclamation and Enforcement from asserting that the party did not have a small operator exemption for a particular permit must clearly demonstrate its entitlement to the estoppel.

3. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Generally

Affidavits to support allegations of fact in a motion for summary decision filed pursuant to 43 CFR 4.1125 are not necessary when there is no disputed issue as to any material fact.

APPEARANCES: David O. Smith, Esq., and Marcia A. Smith, Esq., Corbin, Kentucky, for Daniel Brothers Coal Company; John Phillip Williams, Esq., Office of the Field Solicitor, Knox-

ville, Tennessee, and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

Daniel Brothers Coal Co. (Daniel Brothers) has appealed from a Mar. 18, 1980, summary decision by Administrative Law Judge David Torbett sustaining Notice of Violation 79–II–92–5 containing one violation for allegedly failing to eliminate a highwall and restore the disturbed area to approximate original contour in violation of 30 CFR 715.14. The notice was issued pursuant to sec. 521(a)(3) of the Surface Mining Control and Reclamation Act of 1977 (Act).[1] Also Daniel Brothers' application for temporary relief was denied.

For the reasons stated below, the Administrative Law Judge's decision is affirmed.

Factual and Procedural Background

On Dec. 20, 1979, an OSM inspector visited Daniel Brothers' Deep Creek mine in Whitley, Kentucky, and the next day issued Notice of Violation 79–II–92–5. Daniel Brothers filed an application for review on Jan. 21, 1980, seeking vacation of the notice and arguing that OSM should be estopped from asserting that Daniel Brothers did not have a small operator exemption for Kentucky State permit No. 118–0001, issued on Aug. 21, 1978, pursuant to which mining had been undertaken at the Deep Creek mine.[2] Daniel Brothers received permit No. 118–0001 on Aug. 21, 1978.

On Feb. 11, 1980, OSM filed an answer to the application for review stating that Daniel Brothers never received a small operator's exemption for permit No. 118–0001; that OSM had granted an exemption for another Daniel Brothers' mine, permit No. 5779–76; and that even if Daniel Brothers had applied for an exemption for permit No. 118–0001, it could not have received an exemption because that permit was not issued until Aug. 21, 1978, and according to 30 CFR 710.12(b)(2), the exemption was not available for a permit or renewed permit issued on or after Aug. 3, 1977.

On Mar. 14, 1980, OSM filed a motion for summary decision pursuant to 43 CFR 4.1125, stating that the pleadings failed to demonstrate a dispute as to any material fact. Daniel Brothers filed an application for temporary relief on Mar. 17, 1980. The following day the Administrative Law Judge granted

---

[1] 30 U.S.C. § 1271(a)(3) (Supp. I 1977).

[2] The small operator exemption provision of the Act, 30 U.S.C. § 1252(c) (Supp. I 1977), allowed operators who filed applications pursuant to 30 CFR 710.12, and who met certain qualifications, to be exempt from complying with various sections of the Act and regulations, including the elimination of highwalls and return to approximate original contour provisions, until Jan. 1, 1979.

OSM's motion and issued his summary decision.

Daniel Brothers filed an appeal with the Board on Mar. 25, 1980. It does not deny the existence of a highwall at its Deep Creek mine. However, it seeks to avoid the requirement that the area be returned to approximate original contour by asserting that OSM should be estopped from enforcing that requirement because appellant believed it had a small operator exemption for permit No. 118–0001.[3]

Appellant bases its estoppel theory on the argument that it relied on representations and actions by State officials that its operations pursuant to permit No. 118–0001 were covered by the small operator exemption, and that it also relied on an Oct. 6, 1978, form letter from OSM which indicated to appellant that it had the exemption for permit No. 118–0001. Appellant contends that because of such representations it did not return the area mined prior to Jan. 1, 1979, to approximate original contour and that requiring appellant to do so at this time would cause great financial hardship.

Discussion

The Congress did not enact the Surface Mining Control and Reclamation Act of 1977 for the purpose of exempting persons from its strictures. It was enacted, among other reasons, to protect the environment and to insure the reclamation of mined areas.[4] The proviso that certain small operators are exempted from some of the performance standards is an exception to the general requirement of the Act.[5] The Secretary enacted regulations which provided how the exemption could be obtained.[6] Among the requirements was that of making written application to OSM in a specified manner by May 3, 1978.[7]

---

[3] There is no question that appellant neither applied for nor ever actually received a small operator exemption for permit No. 118–0001.

[4] 30 U.S.C. § 1201 (Supp. I 1977) states:

"The Congress finds and declares that—

* * * * * * *

"(c) many surface mining operations result in disturbances of surface areas that burden and adversely affect commerce and the public welfare by destroying or diminishing the utility of land for commercial, industrial, residential, recreational, agricultural, and forestry purposes, by causing erosion and landslides, by contributing to floods, by polluting the water, by destroying fish and wildlife habitats, by impairing natural beauty, by damaging the property of citizens, by creating hazards dangerous to life and property by degrading the quality of life in local communities, and by counteracting governmental programs and efforts to conserve soil, water, and other natural resources."

30 U.S.C. § 1202 (Supp. I 1977) reads in pertinent part:

"It is the purpose of this chapter to—

* * * * * * *

"(d) assure that surface coal mining operations are so conducted as to protect the environment;

"(e) assure that adequate procedures are undertaken to reclaim surface areas as contemporaneously as possible with the surface coal mining operations."

[5] 30 U.S.C. § 1252(c) (Supp. I 1977) established that a small operator exemption was available to a surface coal mining operation that:

1. Was in operation pursuant to a state permit issued before August 3, 1977;
2. Held a permit issued to a "person" in existence before May 2, 1977; and
3. Had total annual production of coal which did not exceed 100,000 tons.

[6] 30 CFR 710.12; *see also* comment 9, Part 710—Initial Regulatory Program, 42 FR 62642 (Dec. 13, 1977). 30 CFR 710.12(e) required that the "request for exemption shall be in the form of an affidavit under oath." 30 CFR 710.12(g)(1) states that the exemption shall be granted if "[t]he permittee has satisfied his burden of proof by demonstrating eligibility for the exemption."

The permit in question was issued on Aug. 21, 1978, and no request in any form was ever made to OSM for an exemption for that permit. Consequently, the record shows that the statutory requirement that the permit to be exempted be in existence before Aug. 3, 1977, was not met. Nor were the regulatory requirements satisfied that an exemption request be made before May 4, 1978, and that it be made in a certain affidavit form.[8]

[1] The authorities are in agreement that one seeking an exception from the coverage of a statute must affirmatively demonstrate entitlement to that treatment. *Piedmont & Northern Ry. Co.* v. *Interstate Commerce Comm'n*, 286 U.S. 299 (1932); *United States* v. *McElvain*, 272 U.S. 633 (1926); *Ryan* v. *Carter*, 93 U.S. (3 Otto) 78 (1876); *United States* v. *Dickson*, 40 U.S. (15 Pet.) 141 (1841). This is especially so for statutes whose purpose is corrective. *Piedmont & Northern Ry. Co.* v. *Interstate Commerce Comm'n*, *supra*. Daniel Brothers would have the Board recognize its entitlement to a small operator exemption on the basis of equitable considerations, rather than on the basis of entitlement under the terms of the Act and implementing regulations. As is discussed below, however, Daniel Brothers has not established entitlement to relief on equitable grounds.

Daniel Brothers proposes to carve a small operator exemption out of the law by invoking the doctrine of equitable estoppel.[9] Even if that doctrine might ever be applicable to the activities of OSM, it is not in these circumstances. Without retracing the tortuous path of those who have sought equitable estoppel against the Federal Government, it will suffice to say that the prevailing standard is that each of the following four elements must be present:

> (1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury. [*United States* v. *Georgia-Pacific Co.*, 421 F.2d 92, 96 (9th Cir. 1970).]

After *Georgia-Pacific*, *supra*, was decided, the same circuit held that a letter from a Government official containing a circular and a summary of existing law could not estop the Government. Although there might have been a misunderstanding of the contents by the citizen, there was no active misrepresentation by the Government agent. *United States* v. *Consolidated Mines & Smelting Co., Ltd.*, 455 F.2d 432 (9th Cir. 1971); *see also United States* v. *Ruby Co.*, 588 F.2d 697 (9th Cir. 1978).

---

[7] While 30 CFR 710.12(d) indicates the date to be March 1, 1978, it was extended to May 3, 1978. *See Wilkinson's, Inc.*, 1 IBSMA 1 (1978).

[8] Apparently Daniel Brothers is a partnership (Exh. 7 to appellant's brief on appeal. No showing has been made in this case as to when that partnership was established, thereby opening to question whether it was a person in existence before May 2, 1977, as required by 30 U.S.C. § 1252(c) (Supp. I 1977).

[9] Even though the Board does not accept the applicability of estoppel to this situation, we do wish to acknowledge the authoritative brief on the topic submitted by Daniel Brothers. All too often the authorities to which we are referred are the ubiquitous "It is clear . . ." and "As is well known . . ." Occasionally, we are favored with a reference to a hornbook; sometimes even the specific section of the text is cited. Counsel for Daniel Brothers has not followed this customary practice and we appreciate it.

[2] Daniel Brothers claims to have relied to its potential detriment on advice received from a third party who in turn relied on telephone counsel received from an unknown OSM employee at an undetermined time.[10] Daniel Brothers' reliance is purportedly buttressed by an Oct. 6, 1978, letter received from an OSM official referring to an exemption "received" by Daniel Brothers. While appellant applied for an exemption for three of its permits, OSM only granted an exemption for permit No. 5779-76, not the one at issue here. None of this is sufficient, separately or together, to establish an equity that would justify an estoppel of OSM to enforce the provision of the Act.[11] Indeed, the equities are with OSM in light of a permittee who failed to make a timely request in an approved form, and who, if a timely request had been made would not have been entitled to the exemption anyway.

The remaining question is whether this matter was in a proper state for disposal by summary decision. 43 CFR 4.1125 provides for summary decisions upon the record. Subsection (b) states that the movant "shall verify any allegations of fact with supporting affidavits." OSM furnished no affidavits to the Administrative Law Judge.[12] Subsection (c) authorizes the granting of a motion for summary decision when the record shows that there "is no disputed issue as to any material fact" and summary decision is proper as a matter of law. Although 43 CFR 4.1125 is not an exact counterpart of Rule 56 of the Federal Rules of Civil Procedure providing for summary judgments, there is sufficient correspondence in the manner relevant here to avail ourselves of some of the constructions made of Rule 56.

[3] Reason requires, and courts, have held, that only when a material fact remains in issue is summary disposition absolutely inap-

---

[10] Daniel Brothers asserts that it relied upon the advice of representatives of the Commonwealth of Kentucky that it had an exemption for all of its operations, not merely the one specified in the granting of the exemption to permit No. 5779-76 (Exh. 8 to appellant's brief on appeal).

[11] Without going any further into why it cannot be concluded that the OSM official who sent the Oct. 6 letter intended to convey improper information for Daniel Brothers to act upon, nothing in the record supports the proposition that Daniel Brothers was ignorant of the facts—an indispensable element of the *Georgia-Pacific* rule. Daniel Brothers' experience with OSM's small operator exemption procedures—three requests, two denials, one granted—leads to no reasonable conclusion other than that there was no excusable ignorance of the true facts.

[12] Not until the matter arrived here on appeal did OSM submit an affidavit concerning: (1) that there were three requests for exemption made by Daniel Brothers (two denied and one granted); (2) that no request was made and no exemption was issued for permit No. 118-0001; and (3) that the OSM letter of Oct. 6, 1978, concerning small operator exemptions, was a form letter sent to every person in the United States who had received an exemption. Exhibit A to appellee's brief. In its brief, appellant concedes the accuracy of all of these assertions except that of the existence of a form letter and that of its universal distribution.

propriate. *E. P. Hinkel & Co., Inc.* v. *Manhattan Co.*, 506 F.2d 201 (D.C. Cir. 1974); *Dewey* v. *Clark*, 180 F.2d 766 (D.C. Cir. 1950). Affidavits to support allegations of fact in a motion for summary decision pursuant to 43 CFR 4.1125 are not necessary when there is no disputed issue as to any material fact. Moreover, the material facts are all contained in records of the Department; therefore, the Administrative Law Judge could have taken official notice of every material fact that Daniel Brothers asserts was not put forth in affidavit form. 43 CFR 4.24(b). OSM did not ask him to do so nor did he in terms do it. Nevertheless, upon the augmented record before us now, summary decision for OSM is certainly justified and no purpose would be served, in view of our decision concerning estoppel, by remanding solely for the purpose of making the hearing record a bit more tidy.

The decision of the Administrative Law Judge is affirmed.

Melvin J. Mirkin
Administrative Judge

Will A. Irwin
Chief Administrative Judge

MANTLE RANCH CORP.

47 IBLA 17

Decided *April 11, 1980*

Appeal from denial of an application to reform and amend homestead patent number 1052943 (D–041587).

Reversed.

1. Conveyances: Generally — Federal Land Policy and Management Act of 1976: Conveyances

Where evidence is persuasive that certain land was included in a homestead patent as the consequence of an error in description, and other land was settled, improved and occupied for several decades thereafter, an application to reform the patent will be allowed where the concerned administrative agencies do not object, the Government's interests are not unduly prejudiced, no third party's rights are affected, and substantial equities of the applicant will thereby be preserved.

APPEARANCES: James D. Robinson, Esq., Meeker, Colorado, for appellant.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

INTERIOR BOARD OF LAND APPEALS

An historical narrative of the background events leading to this appeal is necessary to a proper perspective of the case.

The record indicates that Charles T. Mantle, born in 1898, was reared in the vicinity of the subject land. Upon being discharged from the army following World War I, Mantle settled on remote, isolated, and rugged public land in the canyon along the Yampa (or "Bear") River in the spring of 1919. He made extensive improvements, including a house, barn, corrals, fences, a 1,200-foot irrigation ditch, sheds, a storage cellar, and planted a field with sweet clover and alfalfa.

plus a truck garden and an orchard of 48 fruit trees. His principal operation apparently was cattle, as he was then running between 200 and 300 head. He married in 1926 and several children were born of the marriage. The family resided on the land to the exclusion of a home elsewhere.

It was not until April 1929, 10 years after he settled the land, that Charles Mantle made application for a homestead entry pursuant to the Act of Sept. 5, 1914.[1] His application described the land as follows: "S½NE¼, E½NW¼, Sec. 18, T. 6 N., R. 102 W., 6th Principal Meridian."

This land, as well as other adjoining lands, had been included within a powersite withdrawal dated Aug. 2, 1919. However, upon Mantle's submission of proof that his settlement and occupancy predated the withdrawal, the Assistant Commissioner, General Land Office, ruled that his entry would be allowed without reservation under sec. 24 of the Federal Water Power Act, 41 Stat. 1063, 1075.

Inasmuch as Mantle had made compliance with the requirements of the Homestead Act and was an honorably discharged veteran of World War I, he was entitled to make a commutated (early) final proof of performance. Accordingly, in September 1930, an inspection of the entry was conducted by Edward Doyle, Examiner, General Land Office. Reference will be made later to certain details of Doyle's report. However, the tenor of the report was most favorable to the applicant, and concluded with Doyle's recommendation that the application be allowed. Mantle filed his final proof on Aug. 31, 1931, and on Jan. 26, 1932, a patent was issued to Mantle for the lands described in his homestead application, *supra*.

In 1937 Mantle began construction of a new home in the SW¼NW¼ of sec. 17. The house was completed about 2 years later. It remains in good condition today and is still used by his son's family. Lands adjoining the house on three sides are under cultivation, and have been since the 1930's. Other improvements in this subdivision include an irrigation ditch, a fenced vegetable garden, a road to the house, also fenced, and a 4-strand barbed wire fence parallel to the river and extending into the SW¼NW¼ of sec. 17. (The irrigation ditch and the river fence both originate on patented land in the S½NE¼ of sec. 18 and extend into the SW¼NW¼ of sec. 17.)

Another 40-acre subdivision not described in the patent is the NW¼SE¼ of sec. 18. This land is moderately sloping to extremely steep and inaccessible. At least 30 acres are suitable for grazing, and have been used for this purpose for many years past. The only improvement on this subdivision is a jeep road of sufficient prominence to be depicted on a modern topographic map of the area.

---

[1] This was the statute providing for allowance of second homestead entries (38 Stat. 712). Mantle had originally made application for other land which he never improved or resided upon.

On Aug. 5, 1938, all of the unpatented land in the vicinity was ncluded within the expanded area of the Dinosaur National Monunent, under the administration of he National Park Service. The earlier powersite withdrawal was evoked.

On May 28, 1965, almost exactly 6 years after his original settlenent of the land, and some 33 years fter issuance of the patent, Charles Iantle filed application with the Colorado State Office of the Bureau f Land Management to amend his atent. He asserted that he had only ecently discovered that his patent id not include the SW¼NW¼ f sec. 17, where his home and much f his cultivation and other imrovements are situated, nor the W¼SE¼ of sec. 18, which he s used for grazing and where the ep road is. Instead, he discovered at the patent described 80 acres the E½NW¼ of sec. 18, the reater portions of which is sheer steep sandstone cliffs on the oppote side of the river from the imroved portion of the ranch, and hich is virtually inaccessible and usable for any purpose associated ith the ranch. In his application antle stated that at the time he ed his homestead application in 29, he had a surveyor complete papers for him, and he surmised at the surveyor used an old map hich did not have the Yampa iver properly located. Therefore, proposed to relinquish the 80 res of cliffs north of the river and ked that his patent be amended to include the two 40-acre tracts which are contiguous to the 80 acres correctly described in the patent.

In 1968 Charles T. Mantle conveyed the ranch to his children. In 1969, while camped out in the mountains of Mexico, he was reportedly murdered by bandits at his campsite. The application to reform the patent was refiled by Patrick Mantle, administrator of his father's estate. The ranch was incorporated as a family corporation.

In September 1972, BLM Realty Specialist Lyle T. Fox made a field examination of both the patented and unpatented lands involved in the Mantle application. His report, together with the photographs attached as exhibits provide a most graphic description of his findings and conclusions. Some excerpts from his report follow:

> The E½NW¼ of Section 18, which was also patented to Mantle, contains no improvements nor does it show evidence of clearing or cultivation. Because of steep, rugged topography, access from below is impossible and it is doubtful that livestock could have grazed the portion next to the river. Exhibit "B" shows the tract and the black line represents the southern boundaries.
>
> The two 40 acre tracts that Mantle claimed he intended to include in his homestead are both more physically suited for homesteading than the E½NW¼ (Exhibit "B") that he included supposedly by mistake. The NW¼SE¼ of Section 18 is moderately sloping, to extremely steep and inaccessible from the canyon below. At least 30 acres of the tract are suitable for grazing and have been used for this in the past; however, they have not been cultivated and

> whether they could be is questionable. Since there were no fences found on the tract, nor evidence of fences, it appears that livestock have grazed these slopes and others further downstream in past years. Besides a jeep trail, no other improvements were found on the tract. From the standpoint of utility, this tract fits the topography better than any portion of the E½NW¼ to form a better ranch operation with the S½NE¼. Refer to Exhibit "C" for a photo of that portion of the NW¼SE¼ of Section 18 that is accessible from below.
>
> The SW¼NW¼ of Section 17 is the tract containing the most valuable improvements. Although the house is not the original that was built by Mantle and identified in Doyle's report, it has been there for approximately 36 years. According to Evelyn Mantle, who is the wife of the deceased applicant Charles Mantle, construction of the house began in 1937 and it was completed about 2 years later. It remains in good shape and is lived in during the spring, summer, and fall months. There is also an old log shed behind the house that appears to be older, but its exact age is unknown.
>
> In conclusion, it appears quite obvious from the field examination that Mr. Mantle partially received patent to lands that were not physically suitable for homesteading. It also seems obvious that his original intentions were to include those lands along the river in the SW¼NW¼ of section 17. His intentions concerning the NW¼SE¼ of Section 18 are not quite so clear. However, as mentioned earlier, it definitely has more utility than any portion of the E½NW¼.
>
> It should be further noted that after examining the area, it is easy to understand how a person could confuse the "lay of the land", especially if he was relying on the survey plat dated February 28, 1882, or the plat dated March 30, 1928. Both of these lack the necessary topographic features to show the true land picture. Even knowing the location of the ¼ corner between Sections 17 and 18, a person would be somewhat at the mercy of a land surveyor if he told you where your property line was. Because of the extremely rugged terrain along this section line, for a layman it would be a pure guess to identify its true location. Admittedly, it is rather difficult to understand how one could be off an eighth mile east of the line in a north-south distance of ¼ mile; however, it is not impossible.

Exhibit "B," referred to in the report, is a color photograph of the E½NW¼ sec. 18, and it depicts a huge, monolithic, sandstone block which rises vertically from the valley floor on the opposite side of the river from the improved land. It is virtually devoid of vegetation and appears to be so steep across its front elevation as to be insurmountable even by a mountain goat. It occupies the entire subdivision except for a small "apron" of relatively flat land lying between the outward-curving river bank and the base of the cliff.

Because the unpatented land surrounding the ranch had been included in the Dinosaur National Monument, BLM next made inquiry of the superintendent of the monument, which is under the National Park Service (NPS), also an agency of this Department. The superintendent responded in part:

> My problem was not being familiar with either the land situation or authority to amend the patent. Now that these are clear, we can see no reason for our disapproving the request of Mr. Mantle for the amendment.
>
> I can truthfully say that the Service is not happy with the amendment, but in all honesty, we are quite certain that the original claim by Charles Mantle was in

error, and we must honor the action by your office and Mr. Mantle.

The Rocky Mountain Regional Director, NPS, deferred comment until he could be provided with an opinion by the Office of the Regional Solicitor. Such an opinion was provided, and although it is not in the record before us now, it was obviously supportive of the application. An excerpt from a letter dated Dec. 12, 1974, from the Deputy Regional Director, NPS, to Tim Mantle follows:

> Our Regional Office recently received word of a pending application to amend the patent granted on your property at Dinosaur National Monument in 1932. Our land acquisition personnel have examined the records in the matter and discussed the application with the Bureau of Land Management and with the Regional Solicitor's office.
>
> Based on the facts of record, we believe the evidence indicates that an error was made at the time the original legal description was written. With this letter we would like to advise you that we have no objections to the request for amendment being approved as submitted, and in fact we are willing to do whatever we can to actually get the amendment approved. Our Division of Land Acquisition will continue to work with the technical experts in the Bureau of Land Management handling the application in the hope that the correction can be quickly entered, and the Superintendent and his staff will be available as needed.

At the same time, the Acting Regional Director, NPS, wrote the State Director, BLM, the following: "We recently received the opinion of the Regional Solicitor in Denver referred to in our Oct. 24, 1974 memorandum. Based on this opinion and our examination of the facts of the case, we have no objection to your proceeding to process the claim and approve it as submitted."

As, at this point, BLM, NPS, and the Regional Solicitor's office had all expressed approval of the amendment, BLM's next step was to call upon the applicant to execute and deliver an unrecorded warranty deed conveying title to the United States to the E½NW¼ of sec. 18. The deed was submitted to BLM, accepted, and returned to the applicant's attorney for recordation, together with a request that BLM be provided with (1) an abstract of title or a title insurance policy; (2) receipts evincing payment of all taxes for the subject lands; (3) a certified copy of Charles Mantle's death certificate and a release of the inheritance tax lien on his estate; and (4) a copy of a corporate resolution of the Mantle Ranch Corporation, authorizing the transaction.

The deed was recorded and the foregoing supporting documents were furnished BLM. They were then transmitted to the Regional Solicitor's office, together with the case file, for "review by your office of the conveyance and title documents submitted to us by the applicant." Although the Regional Solicitor was not asked to advise on the legal viability of the application, having already approved it, nevertheless that office responded with the following memorandum opinion to BLM's State Director:

> While it appears that Charles Mantle may have misdescribed, in his Application, the land he intended to enter and that the present amendment may properly describe his intention, the amendment cannot be approved. The land covered by the present application was withdrawn from entry by Power Site Reserve No. 721 as of June 27, 1919. This withdrawal was construed by Power Site Interpretation No. 120 on June 29, 1928. While the withdrawal was revoked on July 8, 1974, all the land in Sections 17 and 18 were withdrawn for Dinosaur National Monument by the Act of September 8, 1960. Therefore, the land applied for in the subject application cannot be patented to the applicant, because it is neither presently available for entry nor was it available for entry in 1932 when the original patent was issued. *Frank H. and Claire E. Steffire*, 3 IBLA 255 (1971).

Although this opinion was in error, as we shall show, *infra*, its effect was to preclude the BLM State Office from finally approving the amendment application, as both the State Director, BLM, and the Regional Director, NPS, still wished to do.

On Apr. 28, 1977, the State Director forwarded the case record to the BLM Director with a memo stating:

> In accordance with Organic Act Directive No. 77-24 we are forwarding to you the subject case file for review and analysis. This is a case in which the Regional Solicitor's Office refuses, because of a legal technicality, to approve amendment of the patent despite the presence of a good faith error.
>
> It is clear from the facts in this case that the patent issued to Charles T. Mantle does *not* describe the land he intended to enter, actually did enter, occupied, and placed valuable improvements upon. The Solicitor, however, takes the position that because the lands entered and the lands described in the patent were withdrawn at the time of entry (and patent), the amendment cannot be approved, even though the withdrawal has since been revoked.
>
> The Solicitor goes on to note that the lands are currently unavailable because of the withdrawal for the Dinosaur National Monument, even though the withdrawing agency (the National Park Service) has advised us by memorandum dated December 12, 1974 (see case file) that they have no objection to our processing the application.
>
> We do not believe that after more than 40 years of paying taxes on the land, occupying it in good faith, and placing improvements thereon, a man should be deprived legal title because of this kind of technicality. This appears to us to be a case involving the kind of good faith error which Section 316 of the Federal Land Policy and Management Act of 1976 was designed and to deal with and which falls within the purview of the aforementioned Directive.

After reviewing the case, the Director found himself in agreement, and referred the matter to the Assistant Solicitor, Lands, with a memo, the final paragraph of which reads:

> In this amendment of patent application, the equities and the approval of the National Park Service are all for the applicant. We have a proper case for amendment, and we have the statutory authority to proceed. We ask that you reverse the decision of the Regional Solicitor, Denver, and allow us to proceed to issue a new and correct patent.

In the meanwhile, NPS was becoming increasingly concerned. Since the deed conveying the E½ NW¼ of sec. 18 to the United States had been accepted by BLM and recorded, the county had lost 80 acres from its tax rolls, the Mantles continued their unauthorized occupancy of the lands applied for, although they were apparently told they could no longer farm the land. Their holdings were reduced to 80 acres, and their income affected. NPS was in the position of having to defer enforcement of its own regulations regarding trespass, grazing, and "inholding" regulations and procedures. Therefore, the Regional Director, NPS, wrote to BLM's State Director on Feb. 7, 1979, as follows, in part:

> We realize your State office has done everything within its authority to bring the subject application to a point of decision. Nevertheless, the case is still pending. We recommend that you forward this memorandum, along with comments of your own, to your Washington office in an effort to expedite a decision on this issue. The National Park Service is in favor of allowing this patent amendment and believe the equities are in favor of the Mantles in this case.
>
> * * * * *
>
> We urge your support in obtaining a final decision from the Washington Solicitor's office acknowledging that the application is proper and that corrected patent should issue.

The case had become to the personal attention of the Secretary, and he requested the advice of the Solicitor. This was forthcoming in a memo from the Solicitor to Secretary dated Jan. 29, 1979. In it the Solicitor undertook to review the case record, evaluate the evidence, and form an opinion of the case on its merits. He concluded:

> [E]xcept for Charles Mantle's statement in his application, there is nothing in the record to indicate that a mistake has een made.
>
> * * * * *
>
> * * * Mantle is simply now asking for new lands without real justification. From this perspective, Mantle simply trespassed when he moved a quarter of a mile off the eastern boundary of his patented lands in 1937, built a new dwelling, and began to improve these lands.

The Solicitor's memo also states: "It is also clear to me that the Regional Solicitor is correct. Even assuming Mantle made an honest mistake because Dinosaur National Monument closed the lands Mantle now wants we cannot without legislation, correct that mistake by withdrawing lands from the Monument and making them available to Mantle."

The case file, together with a copy of the memo, was then transmitted back to the Director, BLM, under cover of a transmittal memo by an attorney in the Solicitor's office. There is nothing in the record to show that Secretary Andrus ever made a decision on the case or issued any instructions concerning it. The case was in turn transferred to the State Director, Colorado, by memo from the Acting Associate Director,[2] instructing the State Director to prepare a decision denying the application to amend the patent.

---

[2] This memo erroneously states, "Since there has been no acceptance of the conveyance of E½NW¼, sec. 18, T. 6 N., R. 102 W., 6th principal meridian, no reconveyance is required so long as the deed is returned." A handwritten note in the file states, "Warranty Deed returned to Mr. Tim Mantle with decision of April 11, 1979, rejecting application to amend patent. JRB—4/11/79." This was incorrect. The record shows that BLM formally accepted the deed by its letter dated July 20, 1976, and returned it to appellant's lawyer with instructions that it be recorded. It was subsequently recorded on Oct. 13, 1976, in Book 417, page 548, presumably in the Deed Records of Moffat County, Colorado.

The Colorado State Office issued its decision rejecting the application on Apr. 11, 1979. The reason given for rejection was as follows:

> While it appears that Charles Mantle may have misdescribed, in his Application, the land he intended to enter and that the present amendment may properly describe his intention, the amendment cannot be approved. The land covered by the present application was withdrawn from entry by Power Site Reserve No. 721 as of June 27, 1919. This withdrawal was construed by Power Site Interpretation No. 120 on June 29, 1928. While the withdrawal was revoked on July 8, 1974, all the land in Sections 17 and 18 were withdrawn for Dinosaur National Monument by the Act of September 8, 1960. Therefore, the land applied for in the subject application cannot be patented to the applicant, because it is neither presently available for entry nor was it available for entry in 1932 when the original patent was issued. *Frank H. and Claire E. Steffire*, 3 IBLA 255 (1971).

This appeal followed.

[1] We cannot agree with the finding in the Solicitor's memo that there was no error in the description of the land entered by Charles Mantle, and that he was simply trespassing when he built his new home and made other extensive improvements in the subdivision adjoining that of his previous home place. Such a finding is directly contrary to that made by everyone else who has been concerned with the case, including the BLM realty specialist who examined the land, the Superintendent of the Dinosaur National Monument, the Rocky Mountain Regional Director, NPS, BLM's Colorado State Director, and BLM's Associate Director, all of whom have opined in writing that there was an error, and that Charles Mantle occupied the lands applied for in good faith. The finding of the Solicitor is based on two facts which are recited in Doyle's report of his 1930 examination of the entry and the accompanying affidavit by Charles Mantle. Doyle's report noted that on the east and south sides of the SE¼NE¼ sec. 18 (where most of Mantle's improvements were then sited) there was a half-mile of three wire fence "across the canyons and between the bluffs." In Mantle's affidavit, dated Sept. 18, 1930, he stated, "That I this day pointed out the ¼ corner between Sections 17 and 18 in this township and range, and the improvements of every kind that I have placed on the lands embraced in this application." Concededly, these two statements, taken together might lead one to conclude, as the Solicitor did, that Charles Mantle knew where the section line was and had fenced it as his boundary. However, other evidence persuades us to the contrary.

The ranch was (and remains) isolated in extremely rugged terrain. There was no road for 12 miles, and access was by foot or horseback. The land was impassible to a wagon. The nearest neighbor was many miles away. Why, then, would Charles Mantle expend the money and extraordinary labor to bring in miles of fence wire on pack horses, cut and set posts in rocky ground, and string fence on two sides of the subdivision where his home, outbuildings, garden, orchard, and much of his cultivation was? (The Doyle report notes that the garden, sweet clover cultivation and alfalfa were also enclosed in three-wire fence.) It surely was not done to keep people out or to delineate his boundaries, as there were no people to be excluded or to take notice of his property lines. Besides, he made no effort to fence any of his other boundaries. His affidavit states he was running 200 to 300 head of cattle then, and the Doyle report states, "The locality in which this homestead is located is ideal for wintering stock, owing to the shelter found on the side hills which slope to the river." It seems apparent that Charles Mantle's motive in fencing the south and east sides of the SE¼ NE¼ was to keep cattle away from his home and other improvements.

The fact that he knew where the section line between secs. 17 and 18 was does not compel the conclusion that he did not intend to include any sec. 17 land in his homestead. He had paid a surveyor to describe his land and to "*make out the papers for the original homestead.*" Having entrusted this task to someone he believed to be a professional, it is easy to believe that Mantle blithely assumed that it had been correctly done and never undertook to analyze it himself. Perhaps there was some failure of communication between Mantle and his surveyor as to the land to be included in the description, or perhaps the surveyor was simply incompetent.

Regardless of how the error was made, however, the most compelling reason for believing that it actually occurred is the land itself. One look at Fox's photograph "B" [3] ought to be sufficient to convince anyone that Charles Mantle could have had no reason to want, or any conceivable use for, the barren, inaccessible, insurmountable sandstone cliffs on the opposite side of the river. The topographic map shows the 5,800-foot contour line near the center of the E½NW¼, and the benchmark across the river in the patented S½NE¼ shows an elevation of 5,154 feet—a difference of 646 feet—which the photograph shows is achieved in a succession of vertical or near-vertical rises. Also, it will be recalled that Charles Mantle had been farming, ranching, and making his home on these lands for 10 years before filing his homestead application, and he had to be intimately familiar with the terrain and its uses. In May 1919, when he first settled there, all the land had the same status, and it was all equally available to him. To believe that he would deliberately have chosen 80 acres of barren, precipitous cliffs across the river in preference to the two 40-acre subdivisions of useful, relatively flat land immediately adjacent to his home place is to impugn his sanity. Mantle devoted most of his life and near-Herculean effort to the successful establishment of this wilderness homestead. He spent 2 years in building his "new" house on the land in sec. 17, which was his residence for the next 30 years and remains today the residence of his son's family. In his application for amendment of the patent, Charles Mantle simply stated, "The land I thought I was locating. I have cultivated and built my home upon, is in the valley along the river side. Of course I would not have made the expenditures I have unless I thought I owned the land." We regard this statement as entirely worthy of belief. His sincere, earnest determination in the founding and maintenance of this homestead belies any suggestion that he would have jeopardized the entire project by investing all this time, money, and labor on land which he knew he did not own, when he could just as easily have built his home on the adjacent patented 80 acres where the original improvements were sited.

---

[3] The caption on Exhibit B is mislabelled "W½NW¼, Section 18," rather than "E½ NW¼," which reference to the topographic map and the text of the report show it to be.

We conclude that there was in fact an error made in the description of the land which Charles Mantle occupied and settled on May 1, 1919.

Having established the fact that an error did occur, we turn now to the question of whether this Department is possessed of the authority to afford the relief applied for.

The land was included in a powersite withdrawal on Aug. 2, 1919, subject to valid existing rights. Had Mantle's settlement postdated this withdrawal, it would not have precluded allowance of his homestead entry. When he made is homestead application in 1929, the Commissioner of the General Land Office, on Aug. 2, 1929, wrote to the Chief of the Field Division, noting that the application "appears to be allowable" and directing:

> You will cause investigation to be made and ascertain whether or not the applicant's alleged settlement was made prior to August 2, 1919, the date of the power site withdrawal withdrawing the lands in question and whether or not said settlement claim has been maintained until the present time, and make appropriate report.

The purpose of this directive was not to establish whether or not the homestead would be allowed but, rather, whether it would be allowed subject to sec. 24 of the Act of June 10, 1920. Doyle's report of his investigation confirmed that Mantle had indeed settled the land in May 1919 and subsequently maintained his settlement. On this basis the Assistant Commissioner wrote to the Register of the Denver Land Office on Apr. 29, 1931, saying:

> The applicant's settlement on and improvement of the land is shown by the record to have commenced in May 1919, prior to the Power Site Withdrawal and the entry will, therefore, be allowed without reservation under section 24 of the Federal Water Power Act.

The reason for fixing Mantle's rights as of the date of his actual settlement of the land rather than as of the date of the allowance of the entry (as the more modern rule provides) is expressed at 48 L.D. 389, 397 (1922), where the Department notes, an entryman "may have credit for residence as well as cultivation before the date of entry if the land was, during the period in question, subject to appropriation by him."

Therefore, if the land with which we are here concerned was actually settled and claimed by Mantle from May 1, 1919, forward, and was merely misdescribed in his subsequent homestead application, neither the powersite withdrawal nor the later withdrawal for the expansion of Dinosaur National Monument would have interdicted his right to the land.

Moreover, even assuming that the successive withdrawals did attach to these lands, we cannot agree that the Secretary is barred from conveying them to appellant.

Charles Mantle originally filed his application for the amendment of his patent pursuant to 43 U.S.C. § 697 (1970). However, that Act was repealed in 1976 and supplanted by legislation which invested the Secretary with broader authority. Sec. 316 of Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1746 (1976). The present application by Mantle Ranch Corp. is being considered pursuant to the 1976 statute. The distinction between the two statutes was analyzed in *Roland Oswald*, 35 IBLA 79, 86 (1978), where we held:

> Section 316 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701 *et seq.* * * * permits the Secretary to correct errors in any documents of conveyance which have been issued by the Federal Government to dispose of public lands. The provision replaces several repealed acts dealing with mistakes. In particular, former 43 U.S.C. § 697 (1964) allowed the Secretary to amend a patent where entry had erroneously been filed for a tract of land not intended to be entered. *The repealed section expressly limited its operation to lands upon which entry could have been made.* Thus, under the old law, no amendment would be possible in the present case because the lands intended to be entered had been withdrawn for a Forest Reserve. *H. L. Bigler*, 11 IBLA 297 (1973); *Frank H. Steffire*, 3 IBLA 255, 257 (1971); *Henry C. Cleek*, A-29257 (March 12, 1963).
>
> *No such limitation appears in the present section*, which reads:
>
> "Sec. 316. The Secretary may correct patents or documents of conveyance issued pursuant to section 208 of this Act or to other Acts relating to the disposal of public lands where necessary in order to eliminate errors. In addition, the Secretary may make corrections of errors in any documents of conveyance which have heretofore been issued by the Federal Government to dispose of public lands."
>
> [Italics added.]

Thus, even if Mantle's rights were subject to the effect of the withdrawals, the Secretary could grant relief at his discretion.[4] Of course, this would properly take into account the desires of the agency administering the withdrawn land. However, in this instance, the National Park Service wholeheartedly supports the conveyance.

---

[4] The case of *Frank H. Steffire*, 3 IBLA 255 (1971), cited by the Regional Solicitor in support of his opinion that withdrawn land cannot be conveyed to an applicant for patent reform, is inapposit. That case construed the effect of 43 U.S.C. § 697 (1970), since repealed. The case has nothing whatever to do with the power of the Secretary under sec. 316 of FLPMA.

Recently, in *George Val Snow*, 46 IBLA 101, 104 (1980), we observed:

> The statute, *supra*, provides that the Secretary *may* correct patents, thereby investing him (and those who are delegated to act for him) with discretion in the matter. Before such discretion can be exercised it must clearly appear that an error was, in fact, made. Otherwise, an application to amend would be barred as a matter of law. Once the fact of error in the patent is established, the other circumstances of the case must be examined to determine whether considerations of equity and justice warrant amendment of the patent.

Clearly, in this case considerations of equity and justice require that relief be afforded by granting the application. Not only has the land been occupied and claimed since 1919, the tract in sec. 17 has actually been the site of the family home for more than 40 years and is the place where Tim Mantle, the present occupant, was born. The heirs of Charles Mantle are entitled to what their father and husband actually earned by his compliance with the homestead law. *Cf. George Val Snow*, *supra.* No undue prejudice to the public interest will result. Moreover, the written acceptance by BLM of the deed of the E½ NW¼ of sec. 18 from appellant to the United States, and the subsequent recordation of that deed at BLM's direction, in contemplation that the patent would be amended, have significant implications in equity.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Colorado State Office, Bureau of Land Management, is reversed and the case is remanded with instructions to amend the patent in accordance with the application.

Edward W. Stuebing
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Joseph W. Goss
Administrative Judge

APPEAL OF J. T. GREGORY & SON, INC.

IBCA-1260-4-79

Decided *April 30, 1980*

Contract No. 14-16-0004-457, Fish and Widlife Service.

Sustained in Part.

1. Contracts: Construction and Operation: Subcontractors and Suppliers—Contracts: Disputes and Remedies: Damages: Liquidated Damages

Where a contractor claims excusable delays by reason of the failure of suppliers to timely supply material or to replace damaged or nonspecification material, the failure to show that the suppliers' delays were without the fault or negligence of both the contractor and the suppliers precludes a finding that the delays were excusable under the contract.

2. Contracts: Disputes and Remedies: Burden of Proof—Contracts: Disputes

and Remedies: Damages: Liquidated Damages—Contracts: Performance or Default: Excusable Delays

Where a contractor seeks relief from the assessment of liquidated damages for delayed completion of the contract work due to alleged excessive rain, the claim is denied for want of proof for failure to show that the amount of rain constituted unusually severe weather.

APPEARANCES: Mr. J. T. Gregory, Sr., President, J. T. Gregory & Son, Inc., Jackson, Georgia, for Appellant; Mr. Donald M. Spillman, Department Counsel, Atlanta, Georgia, for the Government.

OPINION BY ADMINISTRATIVE JUDGE LYNCH

INTERIOR BOARD OF CONTRACT APPEALS

In this appeal, the contractor seeks relief from the assessment of liquidated damages in the amount of $16,650, and requests payment of three claims for extra work alleged to have been required by the regional engineer. The appeal is submitted on the record. The Government's answer dated June 4, 1979, concedes that the three extra work claims totaling $808.09 were inadvertently denied by the contracting officer in his findings of fact, and advises that these claims would be allowed upon remand by the Board. This dispute has been the subject of discussion between the parties since the work was accepted as being substantially complete on Jan. 26, 1976, without significant agreement on the 222 days of liquidated damages assessed against the contractor at $75 per day. The contracting officer's final decision dated Nov. 28, 1978, included detailed findings on the contractor's claim for relief from liquidated damages and included a remittance for 9 days of liquidated damages in the amount of $675.

The contracting officer may reconsider his decision at any time before a final decision by the Board (or prior to a decision on a motion for reconsideration, if timely filed). The record shows that the parties have continued to correspond and to discuss the question of excusability of all or a portion of the delinquent performance time after the contract completion date, without modification of the contracting officer's decision. Therefore, we see no basis for remanding the appeal for reconsideration by the contracting officer where his final decision included the claim before us. We treat the statement in the Government answer as a concession of liability, however, and allow the three extra work claim items in the amount of $808.09.

Apart from the contractor's claim that the delinquent performance time was excusable by reason of adverse weather conditions and the inability to timely secure material from his suppliers, the record discloses no disagreement on the basic facts in the case. Consequently, much of the pertinent information concerning the background of this dispute is taken from the contracting officer's findings of fact.

Background

Contract No. 14-16-0004-457 was awarded to J. T. Gregory & Son, Inc., on July 22, 1974. The contract was prepared on Standard Form 23-A (October 1969 edition) and contained the usual Clause 5, "Termination for Default-Damages for Delay-Time Extensions" with the relevant paragraph (d) as follows:

> (d) The Contractor's right to proceed shall not be so terminated nor the Contractor charged with resulting damage if:
>
> (1) The delay in the completion of the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor, including but not restricted to, acts of God, acts of the public enemy, acts of the Government in either its sovereign or contractual capacity, acts of another contractor in the performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, unusually severe weather, or delays of subcontractors or suppliers arising from unforeseeable causes beyond the control and without the fault or negligence of both the Contractor and such subcontractors or suppliers; and
>
> (2) The Contractor, within 10 days from the beginning of any such delay (unless the Contracting Officer grants a further period of time before the date of final payment under the contract), notifies the Contracting Officer in writing of the causes of delay.
>
> The Contracting Officer shall ascertain the facts and the extent of the delay and extend the time for completing the work when, in his judgment, the findings of fact justify such an extension and his findings of fact shall be final and conclusive on the parties, subject only to appeal as provided in Clause 6 of these Gener Provisions.

The work consisted of clearin grubbing, stripping, grading, fil ing, and shaping of constructio areas; removal and disposal of i place items; construction of a com fort station, sewage collectio treatment, and disposal system, i cluding sewage collection line sewer manholes, sewage treatmen filtration-chlorination system, e fluent outfall line, reinforce concrete headwall, and variou allied items of work at the Pie mont National Wildlife Refug Round Oak, Georgia. One chang order was issued on June 17, 197 which changed the wood siding m terial on the comfort station buil ing from southern pine to ceda This change order increased th amount of the contract by $1.14 and added 10 calendar days in pe formance time. One extra wor order was issued on Sept. 4, 197 for the furnishing and installing o an electric water heater in the utilit room of the comfort station for a amount of $750 and an increase o 20 calendar days in performanc time. The contract allowed for total of 270 calendar days for com pletion of the work, including th additional time provided for by th contract modifications. The contrac provided for a rate of liquidate damages for failure to complete th work within the time specified i the amount of $75 per day for eac calendar day of delay.

The contract stipulated that th notice to proceed with the wor would not be issued until 60 calendar days after award of the contract. Accordingly, the notice to proceed was issued Sept. 20, 1974, and was acknowledged as received by the contractor on Sept. 21, 1974. The completion date for the contract was June 18, 1975. However, the work under the contract was not accepted by the Government as being substantially complete until Jan. 26, 1976, resulting in 222 days of liquidated damages levied against the contractor.

In his letter of June 7, 1975, the contractor requested a time extension of 151 days, of which he claimed 109 days of adverse weather conditions which either prevented work at the job site or affected performance to such an extent that very little was accomplished and 42 Saturdays, Sundays, and holidays which were not affected by adverse weather.

In his letter of July 3, 1975, contractor stated that electrical equipment specified was ordered in October 1974 and had not yet been delivered as well as numerous items contained in sec. 16 of the specifications. Contractor further stated that completion of the project was contingent upon receipt of those materials.

By letter dated Nov. 3, 1975, contractor advised once again of delivery problems with the electrical equipment and cited same difficulty in acquiring partitions and accessories for the comfort rooms and shower rooms at the comfort station.

The contractor, in his letter of Feb. 28, 1976, stated that:

> There have been many delays encountered during the construction of the project which we feel warrants an extension of time in accordance with the provisions of the contract (Information to substantiate our claim for time extension is being collected and assembled and will be presented as quickly as possible).

The contractor has asked to be relieved of all liquidated damages. It would appear that relief is sought for adverse weather conditions experienced during the execution of the project and for days other than what is considered the normal "work week," as expressed in contractor's letter of June 7, 1975, and late material delivery problems expressed in letters dated July 3 and Nov. 3, 1975.

By contracting officer's letter of June 17, 1975, contractor was advised that the performance time as established in the contract was *calendar* days and that Saturdays, Sundays, and holidays must be included in the calculation of performance time. Further, he was advised that a findings of fact and decision of the contracting officer would be written when time permitted as to the adverse weather conditions affecting the work.

In that same letter, the contractor was also told that the Government was not satisfied with the progress of the work at the site. Very little work had been done since the progress report made following the period, ending Feb. 15, 1975; and although the weather may have affected ground conditions on a number of days, more than $4,000 worth of work should have been completed since February 15. Contractor was requested to furnish an estimate as to when all work required under the contract would be completed.

The contractor advised in his letter of July 3, 1975, that he expected to complete all work on or about Aug. 1, 1975, contingent upon receipt of required materials within a few days.

As to material supplier delivery delays expressed in contractor's letters of July 3 and Nov. 3, 1975, the contractor was advised by the contracting officer's letter of Oct. 23, 1975, and again by letter dated Nov. 11, 1975, that documentation would have to be furnished establishing the existence of such delays.

In a letter dated Feb. 11, 1976, contractor was notified that the Government was accepting the contract as substantially complete as of Jan. 26, 1976. A list of eight items remained unfinished. The contractor, however, was permitted to complete these items under the 1-year warranty period since certain items had to come from various manufacturers.

The Contracting Officer's Findings

(1) *Contractor's Request for Relief from Liquidated Damages Based on Adverse Weather Delays.*

Based on information provided with his letter of June 7, 1975, in which the contractor requested time extension of 151 days (109 of which he claimed adverse weather conditions prevented or affected work performance at the site and 42 Saturdays, Sundays, and holidays which were not affected), the contracting officer finds:

(a) From information obtained from the climatological data published by the Department of Commerce and from the Government Inspector's daily logs, the following facts were established:

(i) During the months of September (day 22 thru day 30), October, and November 1974 only a few days of work performance were affected by adverse weather conditions.

(ii) During the month of December 1974 a total of 7.26 inches of precipitation was indicated for the area of the project, a departure of 1.53 inches from the normal. Rain was scattered during the month and there was no unusual concentration that would have affected work performance. Contractor worked 8 days out of the 31 days in the month.

(iii) During the month of January 1975 a total of 6.96 inches of precipitation was indicated, a departure of 1.14 inches from the normal. Rain was scattered during the month and there was no unusual concentration that would have affected work performance. Contractor worked 3 days out of 31 in the month.

(iv) During the month of February 1975 a total of 9.95 inches of precipitation was indicated, a departure of 3.77 inches from the normal. There was a period between February 16 and 24 in which the contractor did not work and rain was concentrated so as to probably affect work performance. The contractor worked 11 days out of 28 days in the month.

(v) During the month of March 1975 a total of 10.47 inches of precipitation was indicated, a departure of 3.27 inches from the normal. Rain was scattered during the month and there was no unusual concentration that would have affected work performance. Contractor worked 19 days out of the 31 days in the month.

(vi) During the month of April 1975 a total of 1.92 inches of precipitation was indicated, a departure of minus (–) 3.49 inches from the normal. Rain was scattered during the month and there was no unusual concentration that would have affected work performance. Contractor worked 15 days out of 30 in the month.

(vii) During the month of May 1975 a total of 6.91 inches of precipitation was indicated, a departure of 2.70 inches from the normal. Rain was scattered during the month and there was no unusual concentration that would have affected work performance. Contractor worked 17 days out of the 31 days in the month.

Based on information given in subparagraphs (i) through (vii), the days of adverse weather that the contractor claims in the months of September, October, November, December, January, March, April, and May are not considered as "unusually severe weather" needed to establish an excusable delay as defined in Clause 5(d) of Standard Form 23–A, General Provisions (Construction Contract), which was made a part of subject contract. Such weather conditions which existed during those months are considered a part of the general hazard assumed by the contractor in connection with performance of the contract. During the month of February 1975 the period of 9 days (February 16 through February 24) where no work was performed by the contractor and where there existed concentrated rain is considered to be "unusual." Contractor will be permitted a 9-day remittance of liquidated damages in the amount of $675.

(b) Contractor is not entitled to 42 Saturdays, Sundays, and holidays on which there was no rain. These days must be included in the calculation of performance time since time completion in the contract was expressed in calendar days.

(2) *Contractor's Request for Release from Liquidated Damages Based on Material Supply Delays.*

Contractor's request is denied since the contractor has failed to present evidence establishing existence of excusable delays as defined in Clause 5(d) of Standard Form 23–A, General Provisions (Construction Contract), which was made a part of subject contract.

Discussion and Findings

The above findings of the contracting officer resulted in the following allowances:

Payment of amount withheld by the Government	$800
Payment for one extra work item	60
Remission of 9 days of liquidated damages	675
	1,535

In support of his claim for excusable delays due to the failure of material suppliers to make timely deliveries, appellant offers many letters from suppliers reciting the difficulties encountered in making shipments on time or relating to the replacement of materials damaged during the initial shipment or of items shipped which did not comply with specifications. The reasons given were:

1. One supplier advised of a heart attack and hospitalization of one of its personnel and later fabrication problems with one of its suppliers.

2. Repeated promises of scheduled deliveries by one supplier were not met with the result that material promised in December 1974 was not received until July 1975.

3. A drinking fountain delivered late initially was found to be cracked and was not replaced until 4 months later.

4. Specified decorative roof grills could not be obtained and after a specification deviation was granted, substitute grills were obtained.

5. Excessive breakage of block during shipment was not determinable until time for use so that replacement orders were delayed.

6. The installation of nonspecification roof rafters were required to be replaced by the Government inspectors, resulting in delay in securing replacement rafters of the correct size.

7. A filter unit was found to malfunction after installation and testing and delay was encountered in securing a replacement unit.

8. Materials stored on the site were found to have missing items and required added time to secure replacements.

Appellant has the responsibility for managing his subcontractors and suppliers to assure that they perform in accordance with the contract agreements with appellant. The excusable delays for which appellant may not be held responsible respecting his suppliers are "delays of subcontractors or suppliers arising from unforeseeable causes beyond the control and *without the fault or negligence of both the Contractor and such subcontractors or suppliers.*" (Italics added.) The unforeseeable causes that would excuse appellant for delays in performance are such acts as are listed in Clause 5, *e.g.*, acts of God, acts of the public enemy, fires, floods, epidemics, strikes, etc. None of the reasons given by appellant for delays in performance by his suppliers can be seen to be caused by such causes that would be without the fault or negligence of either. Failures of suppliers to ship materials when promised, or the shipment of damaged or nonspecification material are within the control of the supplier to avoid, and therefore, are not without the fault of the suppliers.

[1] Appellant has not provided evidence that any of the suppliers failed to timely deliver materials due to a cause beyond the supplier's control. Therefore, we find that the delays alleged to be caused by failures of suppliers to timely deliver are not excusable delays within the meaning of Clause 5 of the contract.

In regard to delays alleged to be due to unusually severe weather, appellant relies on the U.S. Department of Commerce climatological data for June, July, and August 1975, and the rainfall data computed from the same source and included in the contracting officer's findings of fact. In addition, appellant's letter dated June 7, 1975, contains a tabulation of weather conditions as reflected on daily reports of the project inspector, and purports to show 109 workdays and 30 weekend days or holidays affected by adverse weather conditions. Essentially, appellant claims that any day listed with an entry of "rain," "wet," "muddy," "damp," or "damp, soft ground" should be considered as a day of excusable delay because of unusually severe weather within the meaning of Clause 5. The fact that there were days during the contract performance period on which it rained, and subsequent days when the ground was wet or muddy cannot be considered an unusual phenomena, but rather a normal pattern of weather conditions. Under a construction contract, the contractor is not assured that all the workdays will be fair and ideal for the orderly progression of the work. Of 270 calendar days allotted for contract performance, the contractor had to expect a reasonable number of inclement days and plan for them in agreeing to the contract schedule.

A review of the project inspector's tabulation prepared and furnished by appellant shows 1 rain workday in September 1974; 1 day in October; 4 rain and 1 wet day in November; 14 days of rain, wet, muddy or damp in December; 11 similar days in January 1975; 18 days in February; 11 in March; 13 in April; and 7 in May. Absent a more detailed analysis than exists in the record, this pattern of days of rain or the aftereffects of rain appears to be similar to that existing in many parts of the eastern United States. Even should it appear that the amount of rain during the contract performance period exceeded the normal rainfall in the area of the work, appellant has not shown that rain actually interfered with the work under the contract. The record does not show that an excessive amount of rain occurred during the course of outside construction, or when the comfort station was under roof so that the effects of rain may have had less impact on the progress of the work, or any specific evidence that the alleged rain adversely affected the work. (*See McBride and Wachtell*, par. 39.90.)

[2] Appellant's failure to show that the amount of rain was sufficient to constitute unusually severe weather compels our finding that the claim for relief from assessment of liquidated damages must fail for want of proof.

Conclusion

The amounts previously determined to be allowable shall be paid to the appellant, if not previously paid, as follows:

Three extra work claims in complaint dated Feb. 7, 1979, conceded by Government in Answer	$808.09
Amount withheld by Government until correction of all items	800.00
Nine (9) days of remitted liquidated damages allowed in contracting officer's letter of Nov. 28, 1978	675.00
Extra work claim for water closet wall bearing plates allowed in contracting officer's final decision	60.00
Total allowed	2,343.09

The appeal for relief from liquidated damages due to material supplier difficulties and adverse weather conditions is denied.

Russell C. Lynch
Administrative Judge

I concur:

William F. McGraw
Chief Administrative Judge

U.S. GOVERNMENT PRINTING OFFICE : 1980 O - 319-957

APPEAL OF ELLEN DEMIT

4 ANCAB 217

Decided *May 6, 1980*

Appeal of Ellen Demit from the BLM Decision F–14852–A and F–14852–B.

Dismissed.

1. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Dismissal

Absent reasons justifying continuance of the appeal, an appeal will be dismissed when there remain therein no issues to be resolved by the Board.

2. Alaska Native Claims Settlement Act: Administrative Procedure: Decision to Issue Conveyance

When an entry is being excluded from a Decision to Issue Conveyance for the specific purpose of further adjudication, rather than as recognition of such entry pursuant to 43 CFR 2650.3–1(a), the decision must so state.

APPEARANCES: Daniel Callahan, Esq., Alaska Legal Services Corp., on behalf of appellant; Robert H. Hume, Jr., Esq., Keane, Harper, Pearlman & Copeland, on behalf of Dot Lake Native Corp.; M. Francis Neville, Esq., Office of the Regional Solicitor, on behalf of the Bureau of Land Management.

OPTION BY ALASKA NATIVE CLAIMS APPEAL BOARD

The Alaska Native Claims Appeal Board, pursuant to delegation of authority to administer the Alaska Native Claims Settlement Act, 85 Stat. 688, *as amended*, 43 U.S.C. §§ 1601–1628 (1976 and Supp. I 1977), and the implementing regulations in 43 CFR Part 2650 and 43 CFR Part 4, Subpart J, hereby makes the following findings, conclusions and Final Order dismissing the appeal of Ellen Demit, from the above-designated decision of the State Director, Bureau of Land Management.

Appellant, Ellen Demit, appealed the above-captioned decision on the grounds that the Bureau of Land Management (BLM) proposed to convey to Dot Lake Village Corp. (Dot Lake) certain lands including lands which are the subject of the appellant's allotment application, F–031446, located in secs. 34 and 35, T. 22 N., R. 7 E., Copper River meridian.

BLM, in a motion filed Apr. 9, 1980, states that they have determined that the appellant's allotment application should be reinstated as a pending application, and that the disputed lands in secs. 34 and 35, T. 22 N., R. 7 E., Copper River meridian, should not be conveyed pending adjudication of the reinstated application. Therefore, BLM moves the Board to issue an order to amend the Decision to Issue Conveyance (DIC) to exclude the pending allotment application and to dismiss this appeal.

Dot Lake continues to assert its opposition to validity of appellant's claim for Native allotment, but does not oppose remanding the matter to BLM for further adjudication. (Reply to Statement of Jurisdiction, Interest Affected and Reasons, Apr. 18, 1980.)

By Stipulation filed with the Board Apr. 25, 1980, appellant concurs in the motion of BLM.

[1] Absent reasons justifying continuance of the appeal, an appeal will be dismissed when there remain therein no issues to be resolved by the Board.

Therefore, based upon motion of BLM and the file record of this appeal, the Board hereby Orders BLM to amend the DIC to exclude Native allotment application (F-031446) of appellant, Ellen Demit, from secs. 34 and 35, T. 22 N., R. 7 E., Copper River meridian, and to proceed with adjudication of said allotment.

The Board further Orders that the amendment to the DIC clearly states that the appellant's allotment applications is being excluded for purposes of further adjudication.

[2] Regulations in 43 CFR 2650.3-1(a) require BLM to "exclude any lawful entries or entries which have been perfected under, or are being maintained in compliance with, laws leading to the acquisition of title." The Board finds that when an entry is being excluded from a DIC for the specific purpose of further adjudication rather than as recognition of such entry pursuant to 43 CFR 2650.3-1(a), the decision must so state.

This decision of the Board to dismiss this appeal on motion of BLM is for the sole purpose of enabling BLM to proceed with adjudication of appellant's application for Native allotment. Therefore, the Board Orders that any decision resulting from BLM's adjudication shall be served on all parties to this appeal.

Based upon the above findings and conclusions, the Board hereby dismisses the above-designated appeal.

Judith M. Brady,
Chief Administrative Judge.

APPEAL OF BRISTOL BAY NATIVE CORP.

4 ANCAB 222

Decided: *May 6, 1980*

Appeal of the Bristol Bay Native Corp. from a Bureau of Land Management decision.

Dismissed.

1. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Dismissal

Absent reasons justifying continuance of the appeal, an appeal will be dismissed when no issues remain to be resolved by the Board.

2. Intervention

Intervention in proceedings before the Alaska Native Claims Appeal Board is in the discretion of the Board. 43 CFR 4.909(b).

3. Intervention

The Board will not allow intervention following resolution of the issues on appeal.

4. Alaska Native Claims Settlement Act: Administrative Procedure: Decision to Issue Conveyance—Alaska

Native Claims Settlement Act: Administrative Procedure: Publication

A redetermination of navigability by the Bureau of Land Management which modifies a published decision is itself a decision requiring publication in accordance with 43 CFR 2650.7.

APPEARANCES: Thomas S. Gingras, Esq., on behalf of Bristol Bay Native Corp.; Robert C. Babson, Esq., Office of the Regional Solicitor, on behalf of the Bureau of Land Management; James T. Brennan, Esq., Hedland, Fleischer and Friedman, on behalf of Alaska Peninsula Corp.

OPINION BY ALASKA NATIVE CLAIMS APPEAL BOARD

JURISDICTION

The Alaska Native Claims Appeal Board, pursuant to delegation of authority in the Alaska Native Claims Settlement Act, 85 Stat. 688, *as amended*, 43 U.S.C. §§ 1601–1628 (1976 and Supp. I 1977), and the implementing regulations in 43 CFR Part 2650 and 43 CFR Part 4, Subpart J, hereby makes the following findings, conclusions and Final Order dismissing the appeal of Bristol Bay Native Corp. from the above-designated decision of the Bureau of Land Management.

Pursuant to regulations in 43 CFR Part 2650, *as amended*, and 43 CFR Part 4, Subpart J, the State Director or his delegate is the officer of the Bureau of Land Management, United States Department of the Interior, who is authorized to make decisions on land selection applications involving Native corporations under the Alaska Native Claims Settlement Act, subject to appeal to this Board.

PROCEDURAL BACKGROUND

The above-referenced decision of the Bureau of Land Management (BLM) approved the conveyance to Kokhanok Native Corp. (Kokhanok) of the surface estate of certain specified lands and conveyance of the subsurface estate of the same land to Bristol Bay Native Corp. (BBNC).

On Jan. 11, 1980, BBNC appealed said decision "insofar as it (1) constitutes a determination that Gibraltar Lake and Kokhanok Lake are non-navigable and (2) purports to charge the land submerged beneath those lakes against BBNC's acreage entitlement under Sections 12(a) and 14(f) of the Alaska Native Claims Settlement Act."

On Mar. 10, 1980, the Alaska State Director, BLM, concurred in a BLM redetermination that Kokhanok Lake, Gibraltar Lake, and Gibraltar Creek are navigable. Accordingly, the BLM on Mar. 11, 1980, filed with the Board a request for final order, which request stated that no dispute remains among the parties to this appeal and that the Board's issuance of a final order directing interim conveyance (IC) would now be appropriate. The request suggested the exclusion from the IC of the submerged lands underlying Kokhanok Lake, Gibraltar Lake, and Gibraltar Creek on the grounds that such submerged lands are not considered "public lands." The request also stated that, following such exclusion, the acreage of the submerged lands underlying the named water bodies would not be charged against the acreage entitlement under ANCSA of either BBNC or Igiugig Native Corp.

BBNC thereafter concurred in the BLM's motion except insofar as reference should have been made to Kokhanok Native Corp. or Alaska Peninsula Corp. (APC), with which Kokhanok has merged, rather than in Igiugig Native Corp. BBNC also suggested that APC, not represented by counsel at that time, be given at least an additional 14 days in which to respond to BLM's motion insofar as it pertains to Gibraltar Creek.

APC subsequently appeared and stated that it did not oppose the redetermination of Gibraltar Creek, nor its inclusion in the final order, if such had no effect on the reservation of easements contained in the Decision to Issue Conveyance (DIC). BLM responded that it does not, as a result of any of the navigability redeterminations filed with the Board as of Apr. 1, 1980, propose to seek any easements not already proposed in the DIC. BLM's response referred to Lower (or Little) Pike Lake, a portion of the Copper River, and an unnamed interconnecting slough, in addition to Kokhanok Lake, Gibraltar Lake, and Gibraltar Creek. The former waters were held to be navigable in a BLM redetermination dated Apr. 1, 1980. BLM, also on Apr. 1, 1980, modified its former request for final order so as to propose the exclusion from conveyance of the lands underlying the water bodies newly determined to be navigable.

On Mar. 21, 1980, the State of Alaska filed a motion:

> (1) to intervene in this appeal as a necessary party for the purpose of determining those issues which relate to the navigability of the water bodies within the conveyance area, and (2) to amend the order segregating submerged lands to specify segregation of the lands underlying the Kokhanok and Copper rivers.

BBNC, APC, and BLM all opposed the State's motion to intervene on the basis that the motion was substantively an untimely notice of appeal and improperly sought to enlarge the scope of the appeal.

DECISION

In this appeal, BBNC appealed BLM's navigability determinations only with regard to Kokhanok Lake and Gibraltar Lake. BLM then made a redetermination that Kokhanok Lake and Gibraltar Lake are navigable, and declared that the acreage of the submerged lands underlying Kokhanok Lake and Gibraltar Lake will not be charged against the acreage entitlement of either BBNC or Igiugig Native Corp. (the Board construes BLM's statement as intending to refer to Kokhanok Native Corp. rather than Igiugig). These actions by BLM, when put into effect, will obviate the basis of this appeal and eliminate all the issues therein. There are, accordingly, no issues yet to be resolved in this appeal, and no reasons justifying the continuance of this appeal are apparent from the record.

[1] Absent reasons justifying continuance of the appeal, an appeal will be dismissed when no issues remain to be resolved by the Board.

The State of Alaska on Mar. 21. 1980, moved to intervene in this appeal to contest the BLM determination that the Copper River and Kokhanok River are nonnavigable. Such motion was filed after the BLM filed notice of its redetermination of the navigability of Kokhanok Lake and Gibraltar Lake.

Intervention in proceedings before the Board is provided for by 43 CFR 4.909(b), which states, "Any person may petition the Board to intervene in an appeal. Upon a proper showing of interest under § 4.902, such person may be recognized as an intervenor in the appeal." Other than requiring service upon all parties of any motion to intervene and the filing with the Board of a certificate of service, 43 CFR 4.909(d), the regulations are void of any further requirements or guidelines regarding intervention.

[2] The provision of 43 CFR 4.909(b) stating that a petitioner "may be recognized as an intervenor" bestows on the Board discretion as to whether to allow intervention.

[3] In the discretion vested in the Board with regard to intervention, and in the absence of regulations regarding timeliness, the Board hereby rules that it will not allow intervention following resolution of the issues on appeal.

Accordingly, the motion of the State of Alaska to intervene is hereby denied.

Arguments have been made as to the permissible scope of intervention. Although the preceding ruling makes it unnecessary to answer these arguments, the Board declares that it would be inclined to rule that it will not allow the use of intervention to inject new and independent issues into an appeal. *See*, *Brune* v. *McDonald*, 75 P.2d 10, 13 (Or. 1938).

The BLM has filed with the Board notice of its redetermination that several water bodies unaffected by this appeal are navigable, and has requested the Board to order these water bodies excluded from the IC.

[4] The Board on Jan. 23, 1980, segregated the lands affected by this appeal from all other lands covered by the DIC appealed. The lands segregated were the submerged lands underlying Kokhanok Lake and Gibraltar Lake. The remainder of the lands covered by the DIC were therefore returned to the jurisdiction of the BLM. If these lands have not been conveyed, the BLM may proceed on its own with exclusion and redetermination. However, any redetermination of navigability which modifies a published decision is in itself a decision requiring pub-

lication in accordance with the provisions of 43 CFR 2650.7.

As to Kokhanok Lake and Gibraltar Lake, the subjects of this appeal, the BLM is hereby Ordered to publish an amendment to the DIC reflecting BLM's redetermination of the water bodies as navigable. Said amendment shall include notice that an appeal may be taken therefrom.

Publication need not delay conveyance of the lands unaffected by redetermination. Water bodies subject to redetermination and publication shall be excluded from conveyance, and the remaining lands conveyed immediately. Exclusion shall be by named water body rather than by sections. The acreage of the excluded submerged lands found to be navigable shall not be charged against the acreage entitlement under ANCSA of BBNC, Kokhanok, or APC.

As to Kokhanok's request that a redetermination of Gibraltar Creek as navigable not result in new easements, it should be noted that public easements are established pursuant to statutory and regulatory requirements, and are not a matter which can be disposed of through stipulation by parties to an appeal. The BLM is authorized and obligated, upon redetermination, to establish any additional easements required by law.

Further, the Board hereby dismisses the above-designated appeal.

JUDITH M. BRADY
Chief Administrative Judge

CLAYPOOL CONSTRUCTION CO., INC.

2 IBSMA 81

Decided *May 16, 1980*

Appeal by the Office of Surface Mining Reclamation and Enforcement from the amended decision of Administrative Law Judge Tom M. Allen (Docket Nos. CH 9-9-R and CH 9-22-R), issued on Oct. 30, 1979, which upheld Notices of Violation Nos. 78-I-3-15, 78-I-3-18, and 78-I-3-19, and vacated Cessation Orders Nos. 78-I-3-1 and 78-I-3-3.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally—Surface Mining Control and Reclamation Act of 1977: Environmental Harm: Significance

A cessation order is not properly issued under sec. 521(a)(2) of the Act unless the environmental harm alleged to be significant may be described objectively on the basis of observations or measurements.

2. Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally—Surface Mining Control and Reclamation Act of 1977: Environmental Harm: Imminence

A cessation order is not properly issued under sec. 521(a)(2) of the Act when the evidence does not support a finding that significant environmental harm may reasonably be expected to occur before the expiration of an abatement period that would be set pursuant to sec. 521(a)(3) of the Act.

APPEARANCES: Billy Jack Gregg, Esq., Office of the Field Solicitor,

Charleston, West Virginia, Mark Squillace, Esq., and James B. Weber, Esq., Office of the Solicitor, Washington, D.C., and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Office of the Solicitor, Washington, D.C., all for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

The Office of Surface Mining Reclamation and Enforcement (OSM) appealed from the amended decision of Administrative Law Judge Tom M. Allen, issued on Oct. 30, 1979, which upheld Notices of Violation Nos. 78–I–3–15, 78–I–3–18, and 78–I–3–19, and vacated Cessation Orders Nos. 78–I–3–1 and 78–I–3–3. Only the validity of the cessation orders was placed in issue in this appeal. We agree with the result reached by the Administrative Law Judge and affirm his decision.

Factual and Procedural Background

The cessation orders which are the subject to this appeal were issued by OSM to Claypool Construction Co., Inc. (Claypool), pursuant to sec. 521(a)(2) of the Surface Mining Control and Reclamation Act of 1977 (Act), 30 U.S.C. § 1271 (a)(2) (Supp. I 1977), on the basis of OSM's finding that Claypool had failed to secure from the State of West Virginia a permit required for surface coal mining operations conducted by the company. In his initial review of these enforcement actions, the Administrative Law Judge upheld the cessation orders.[1] This ruling was appealed by Claypool.[2]

On Sept. 26, 1979, the Board remanded the case to the Administrative Law Judge for a determination whether Claypool's failure to secure a State permit for its activities caused or could be reasonably expected to cause significant, imminent environmental harm to land, air, or water resources.[3] In response to this remanded order, the Administrative Law Judge held that there was insufficient evidence of actual or impending environmental harm to warrant OSM's issuance of cessation orders to Claypool and, therefore, he vacated the orders.[4]

---

[1] Decision of Apr. 18, 1979, Docket Nos. CH 9–9–R and CH 9–22–R, at 2–5.

[2] OSM also filed an appeal with the Board, concerning the ruling of the Administrative Law Judge that he did not have jurisdiction to review the three notices of violation issued to Claypool. In response to this appeal the Board held that the Administrative Law Judge did have such jurisdiction. *Claypool Construction Co., Inc.*, 1 IBSMA 259, 270–271, 86 I.D. 486–492 (1979).

[3] *Claypool Construction Co., Inc.*, 1 IBSMA 259, 272, 86 I.D. 486, 492 (1979). The Administrative Law Judge also was instructed to rule on the validity of Notices of Violation Nos. 78–I–3–15, 78–I–3–18, and 78–I–3–19. These the Administrative Law Judge upheld, except for Violations No. 3 (failure to maintain a copy of the mine permit at or near the minesite) and No. 4 (failure to post a mine identification sign at the entrance to the minesite) of Notice of Violation No. 78–I–3–15. Amended Decision of Oct. 30, 1979, Docket Nos. CH 9–9–R and CH 9–22–R, at 3. The Administrative Law Judge vacated these charges in the notice on the grounds that they were included in the cessation orders. *Id.* Neither party appealed this ruling.

[4] Amended Decision of Oct. 30, 1979, *supra* at 2, n. 3.

OSM filed a notice of appeal from the Administrative Law Judge's amended decision on Nov. 30, 1979. OSM filed a brief; Claypool did not respond.

Issue

The issue in this appeal is whether Claypool's failure to have a State permit in and of itself constituted a condition, practice, or violation which caused or could reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources.

Discussion

A cessation order is properly issued when an OSM inspector observes a condition, practice, or violation of the Act or regulations which is determined to be causing or can reasonably be expected to cause significant, imminent environmental harm.[5] When review is sought of a cessation order issued under such circumstances, OSM must be prepared to supply prima facie proof: (1) of the violation, practice, or condition identified in the order; (2) of significant, imminent environmental harm or a reasonable expectation thereof; and (3) of a casual link between such reasonably expected or existing harm and the proven violation, practice, or condition.[6]

By its evidence in the case OSM established that Claypool conducted surface coal mining operations without a requisite State permit, in violation sec. 502(a) of the Act, 30 U.S.C. § 1252(a) (Supp. I 1977), and 30 CFR 710.11(a)(2)(i).[7] Thus, the first requirement of proof, identified above, was met by OSM. Lacking, however, is proof of the existence or reasonable expectation of significant, imminent environmental harm related to this violation.[8]

[1] Significant, imminent environmental harm to land, air, or water resources is described in 30 CFR 700.5 (1978):[9]

> (i) An environmental harm is any adverse impact on land, air, or water resources, including but not limited to plant and animal life.

---

[5] 30 U.S.C. § 1271(a)(2) (Supp. I 1977); 30 CFR 722.11(b). Other bases for OSM's issuance of a cessation order are: (1) a finding by an OSM inspector of a condition, practice, or violation of an applicable performance standard which creates "an imminent danger to the health or safety of the public" (30 CFR 722.11(a)); and (2) the failure of a person to abate a violation in accordance with the terms of a notice of violation (30 CFR 722.13).

[6] *See* 43 CFR 4.1171(a); *White Winter Coals, Inc.*, 1 IBSMA 305, 311–312, 86 I.D. 675, 678 (1979).

[7] *See* Tr. 8 (stipulation by counsel for Claypool that the company did not have a State mining permit for its operations); W. Va. Code §§ 20–6–8 and 20–6–18(a).

[8] Because the Board was not presented with sufficient evidence of reasonably expected or existing harm to uphold the cessation orders to Claypool, we need not and do not in this decision address OSM's arguments concerning a causal relationship between the failure to secure a mine permit and environmental harm.

[9] No description of the phrase "significant, imminent harm to land, air, or water resources" appears in the 1979 publication of 30 CFR 700.5. The phrase is described, however, in essentially the same language quoted in this decision in 30 CFR 701.5 (1979) (Permanent Regulatory Program: Definitions), and the Board perceives no reason at this time to assign a meaning to the phrase different from that described originally in the initial regulatory provisions and that now appearing in the permanent regulatory provisions. The Board reaches this conclusion without regard to whether the lack of a description of the phrase in 30 CFR 700.5 is the result of editorial oversight or intentional deletion.

> (ii) An environmental harm is imminent if a condition, practice or violation exists which (a) is causing such harm or (b) may reasonably be expected to cause such harm at any time before the end of the reasonable abatement time that would be set under section 521(a)(3) of the Act.
>
> (iii) An environmental harm is significant if that harm is appreciable and not immediately reparable.

In this description, "significant" harm is indicated to mean "appreciable" harm, which leads the Board to conclude that "significant" harm is that which at least may be observed and/or measured.[10] The only record evidence of observed or measured harm is that concerning the quality of water discharged from the area of Claypool's mining activity and the condition of spoil piles found there. In response to these circumstances OSM issued notices of violation to Claypool,[11] thus indicating OSM's judgment that this existing environmental harm did not warrant the issuance of cessation orders. The Board perceives no reason to reject this judgment.

[2] The remaining relevant evidence concerns environmental conditions attributable to mining activity preceding that of Claypool.[12] The Board acknowledges that the environmental harm resulting from this earlier activity could be compounded by Claypool's mining operations and thus become significant. However, even assuming that significant environmental harm could be expected in the future under these circumstances, such harm was not shown by OSM to be imminent. In 30 CFR 700.5, quoted above, "imminent" harm is described as that which may reasonably be expected to occur before the end of a reasonable abatement time that would be set under sec. 521(a)(3) of the Act, 30 U.S.C. § 1271(a)(3) (Supp. I 1977). This period may not exceed 90 days. The record indicates that Claypool had conducted mining operations in the area under consideration for a period of approximately 8 months previous to OSM's issuance of orders to cease these operations.[13] Yet, as was indicated above, OSM's inspectors did not find significant environmental harm at the times of their inspections of Claypool's operations. Indeed, it appears from the evidence that the environmental conditions existing prior to Claypool's operations were improved in some respects by the company's partial reclamation of areas of preexisting mine workings.[14] Under these circumstances the Board does not hold any antic-

---

[10] This is in accord with the range of meaning assigned to "appreciable" by lexicographers (*see, e.g., Webster's Third New International Dictionary* (G. & C. Merriam Co. 1971) at 105), and adopted by many courts. *See, e.g., Noland* v. *Wooten*, 102 Ariz. 192, 427 P.2d 143 (1967).

[11] *See Claypool Construction Co., Inc.*, 1 IBSMA 259, 263–264, 86 I.D. 486, 488–489 (1979) (description of the notices of violation issued to Claypool).

[12] *See id.* at 262, 86 I.D. at 487–488 (1979) (summary of evidence concerning conditions preexisting Claypool's mining activity).

[13] Tr. 180, 229.

[14] *See, e.g.*, Tr. 256–269. This is not to suggest that Claypool's activities were in compliance with applicable performance standards; rather, this observation relates merely to the reasonableness of OSM's expectation of imminent harm from Claypool's activities.

ipated significant environmental harm to have been proven imminent.

Because we have not been presented with evidence of the existence or reasonable expectation of environmental harm adequate to support the cessation orders, the decision of the Administrative Law Judge is affirmed.

Melvin J. Mirkin
Administrative Judge

Newton Frishberg
Administrative Judge

Will A. Irwin
Chief Administrative Judge

EASTOVER MINING CO.

2 IBSMA 70

Decided *May 16, 1980*

Appeal by Eastover Mining Co., from an Oct. 5, 1979, decision by Administrative Law Judge David Torbett in Docket No. NX 9–78–R sustaining Notice of Violation No. 79–II–53–2 and Cessation Order No. 79–II–53–3 issued to Eastover for failure to permit an inspector from the Office of Surface Mining Reclamation and Enforcement to take photographs during an inspection.

Reversed.

1. Surface Mining Control and Reclamation Act of 1977: Inspections: Generally

An inspector may document conditions or practices discovered during an inspection that are believed to violate the Act or regulations by taking photographs.

2. Surface Mining Control and Reclamation Act of 1977: Inspections: Interference

A permittee's refusal to allow OSM to take photographs is an interference with the inspection that is sanctionable under the Act.

3. Surface Mining Control and Reclamation Act of 1977: Inspections: Interference—Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally

Since no provision in the regulations makes interference with an inspection administratively sanctionable, a notice of violation is not proper.

4. Surface Mining Control and Reclamation Act of 1977: Evidence: Generally—Surface Mining Control and Reclamation Act of 1977: Hearings: Generally—Surface Mining Control and Reclamation Act of 1977: Inspections: Interference

Since the reviewing authority may use interference with an inspection against the permittee in any way deemed appropriate, a permittee who interferes with an inspection does so at the risk of severely prejudicing its own case.

APPEARANCES: Karl S. Forester, Esq., Forester & Forester, Harlan, Kentucky, for Eastover Mining Co.; Charles P. Gault, Esq., Office of the Field Solicitor, Knoxville, Tennessee, Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Frank J. Ruswick, Jr., Esq., Walton D. Morris, Esq., Office of the Solicitor, Washington, D.C., all for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

On June 20, 1979, inspectors from the Office of Surface Mining Reclamation and Enforcement (OSM), were conducting a follow-up inspection at Eastover Mining Co.'s (Eastover's) mine in Arjay, Kentucky,[1] pursuant to the Surface Mining Control and Reclamation Act of 1977 (Act).[2] When an inspector attempted to take photographs at the site of an alleged violation, she was informed that company policy prohibited the taking of photographs on company property by anyone except company employees. She was further informed that Eastover would take any photographs she requested and make copies available to her at no charge. She issued Notice of Violation No. 79–II–53–2 to Eastover, alleging a violation of sec. 502(e) of the Act, 30 U.S.C. § 1252(e) (Supp. I 1977), by "refusal to allow federal inspection by refusing to allow inspector to take photographs."[3] Twenty-four hours were given as an abatement period.

On her return the next day, the inspector was again prohibited from taking photographs. Consequently she issued Cessation Order No. 79–II–53–3 to Eastover for failure to abate the violation. On June 25, 1979, the inspector returned to the mine and was permitted to take the photographs. She terminated the cessation order at that time.

On Sept. 15, 1979, a hearing was held before Administrative Law Judge David Torbett on Eastover's application for review of the notice and the order. The opinion from the bench, which was confirmed in writing on Oct. 5, 1979, held that the notice and order were properly issued. Eastover appealed this decision on Oct. 12, 1979. Following the submission of initial briefs by both parties, on Mar. 11, 1980, the Board requested further briefing. All briefs have now been received.

Discussions and Conclusions

Sec. 502(e) of the Act requires the Secretary to establish a Federal enforcement program, including the regular inspection of surface coal minesites. Pursuant to that Congressional directive, 30 CFR Part 721 was promulgated providing for authorized representatives of the Secretary to have a right of entry, without advance notice, to, upon or through any surface coal mining operation to conduct inspections to ascertain compliance with sec. 502 (b) and (c) of the Act, 30 U.S.C. § 1252 (b) and (c) (Supp. I 1977).

[1] Neither the Act nor the regulations specifically state that OSM, without restraint by the permittee, can take photographs during an inspection. However, just as an inspec-

---

[1] On Mar. 29 and June 15, 1979, OSM had issued a notice of violation and a cessation order to Eastover. These citations are not at issue in this appeal.

[2] 30 U.S.C. §§ 1201–1328 (Supp. I 1977).

[3] Notice of Violation No. 79–II–53–2.

tor may use paper and pencil to record observations made during the course of an inspection, an inspector may document conditions or practices that are believed to violate the Act or regulations by taking photographs. The camera is merely a tool used by the inspector to document visual observations. It is possible that pictures taken by an inspector might be used by that inspector in describing to superiors the conditions observed at a particular minesite. This consultation, aided by the photographs, might lead a supervisor to conclude that enforcement action should be taken, or even that enforcement action should not have been taken. Therefore, photographs could be used to allow supervisory inspectors to share in inspection decisions.

Photographs taken by mine operators or their employees are not adequate substitutes for those taken by OSM inspectors during a mine inspection. This conclusion must follow from the possible uses which may be made of photographs by OSM, including their introduction into proceedings to review enforcement actions. Photographs so used must be authenticated, and it is incompatible with the adversarial nature of a review proceeding to require OSM to rely upon an opposing party to authenticate its evidence. The company may, of course, take its own photographs to counter those taken by an inspector; however, the ultimate use in any enforcement proceeding of any photographs taken at a minesite will be determined by their admissibility at a hearing.

[2] Furthermore, a permittee's refusal to allow OSM to take photographs is an interference with the inspection that is sanctionable under the Act. Sec. 521(c), 30 U.S.C. § 1221(c) (Supp. I 1977), allows OSM to seek injunctive relief against a permittee who interferes with a Federal inspection. Sec. 704, 30 U.S.C. § 1294 (Supp. I 1977), provides criminal penalties for willful interference with an inspector.

[3] The question before the Board, however, is whether such interference with an inspection may be reached through the issuance of a 30 CFR 722 notice of violation. 30 CFR 722 implements sec. 521(a) of the Act, 30 U.S.C. § 1271(a) (Supp. I 1977). Sec. 521(a)(3) provides that a notice of violation shall be issued when an inspector finds that a permittee is violating "any requirement of this Act." OSM argues that since a permittee may not interfere with the inspections mandated by sec. 502(e), such interference is a violation of a "requirement of this Act" and subject to a notice of violation. We cannot agree.

Sec. 521(a)(3) certainly does authorize the Secretary to issue notices of violation when it is determined "that any permittee is in violation of any requirement of [the Act]." But it is not only the Act that we are construing here. The enforcement being attempted by OSM is pursuant to sec. 501 (30 U.S.C. § 1251 (Supp. I 1977)) which mandates the enactment of regulations to implement the Act. 30 CFR 722.11, which is concerned with imminent dangers, refers to "conditions or practices, or violations of applicable performance standards." 30 CFR 722.12, which deals with nonimminent dangers, pursuant to which the notice of violation in question would have to have been issued, provides that a notice of violation shall issue when OSM "finds a violation which is not covered by § 722.11." Secs. 722.11 and 722.12, thus, must be read together. In so doing the only kind of violations that are mentioned are "violations of applicable performance standards." We fail to find that interference with an inspector, illegal though it may be, is a violation of a performance standard. This conclusion is buttressed by secs. 521(c) and 704 of the Act, which expressly address and provide judicial sanctions for negative behavior, *i.e.*, interference with inspections. Since we do not find any provision in the regulations making interference with an inspection administratively sanctionable, we hold that the notice of violation and resulting cessation order in this case were improperly issued.

[4] However, even though interference with the inspector is not presently an action for which a notice of violation or cessation order may be issued, this fact in no way precludes OSM from presentng testimony on what a photograph would have shown or on other forms of interference at a hearing n any other notice or order resulting from violations discovered during the inspection. The reviewing authority may use the fact of interference against the permittee in any way deemed appropriate, including but not limited to determining the fact of violation and the amount of a civil penalty. The permittee who interferes in any way with an OSM inspector does so at the risk of severely prejudicing its own case.

For the foregoing reasons, the Hearings Division decision of Oct. 5, 1979, is reversed and Notice of Violation No. 79–II–53–2 and Cessation Order No. 79–II–53–3 are vacated.

MELVIN J. MIRKIN
Administrative Judge

NEWTON FRISHBERG
Administrative Judge

CHIEF ADMINISTRATIVE JUDGE IRWIN DISSENTING:

I believe my colleagues' decision in this case is both unwarranted legally and unfortunate practically. In effect they hold that interference with inspections may only be remedied by recourse to Federal court under sec. 521(c) or 704 until the Secretary promulgates a regulation that specifically provides an administrative sanction for such conduct. I believe existing regulations authorize the issuance of a notice of violation for interference with inspections. 30 CFR 722.12(a) requires an inspector to issue a notice of violation fixing a reasonable time for abatement if he finds a violation which is not covered by 30 CFR 722.11. Sec. 722.11 applies to conditions, practices, or violations of applicable performance standards, which create an imminent danger to the health or safety of the public or which are causing or can reasonably be expected to cause significant, imminent environmental harm. Although regular, thorough inspections are crucial to achieving compliance with the Act, the practice of interfering with an inspection would not necessarily create an imminent danger to public health or safety or cause significant, imminent environmental harm—although it might in some circumstances. Secs. 521(c) and 704, however, provide equitable relief and criminal sanctions for such interference, thus making plain that Congress considered such behavior a serious violation of the Act. Therefore, interference with inspections is "a violation which is not covered by § 722.11" for which "an authorized representative of the Secretary * * * shall issue a notice of violation." 30 CFR 722.12(a).

This interpretation of 30 CFR 722.12 is based on and parallels the enforcement provisions of the Act itself. Sec. 502(e)(1) requires the Secretary to implement an enforcement program for the purpose of ascertaining compliance with the standards of secs. 502(b) and (c). Compliance cannot be ascertained without regular, complete inspections. Allowing complete inspections, including the taking of photographs, is therefore a "requirement" of the Act, violation of which requires the issuance of a notice of violation under sec. 521(a)(3). 30 CFR 722.12(a) is thus the analogue to sec. 521(a)(3), just as 30 CFR 722.11 is to the sec. 521(a)(2) requirement for the issuance of a cessation order for conditions, practices, or violations that create imminent danger to the health or safety of the public or cause or may cause significant, imminent environmental harm.

By declining to interpret 30 CFR 722.12(a) as providing authority for the imposition of sanctions by the executive branch, my colleagues impose unwelcome burdens on Federal prosecutors and Federal courts and potentially encourage subversion of inspections—the essential activity for ensuring effective enforcement of the Act. At the least they impose an unnecessary rulemaking proceeding on the Secretary.

I dissent.

WILL A. IRWIN
Chief Administrative Judge

MAUERSBERG COAL CO.

2 IBSMA 63

Decided *May 16, 1980*

Appeal by the Office of Surface Mining Reclamation and Enforcement from a Nov. 30, 1979, decision of Administrative Law Judge Sheldon L. Shepherd

in Docket No. CH 0–51–R denying appellant's motion to dismiss an application for temporary relief and vacating Cessation Order No. 79–I–68–2, issued for failure to abate Notice of Violation No. 79–I–68–3.

Reversed.

1. Surface Mining Control and Reclamation Act of 1977: Temporary Relief: Applications

Where an application for temporary relief includes none of the elements required by 43 CFR 4.1263, a motion to dismiss the application should be granted.

2. Surface Mining Control and Reclamation Act of 1977: Temporary Relief: Evidence

Where an applicant for temporary relief fails to provide sufficient evidence to support the showings required by sec. 525(c) of the Act, it is error to grant such relief.

APPEARANCES: William F. Larkin, Esq., Office of the Field Solicitor, Charleston, West Virginia, Walton D. Morris, Esq., and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement; John L. Wagner, Esq., Clarion, Pennsylvania, for Mauersberg Coal Co.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

This appeal was filed by the Office of Surface Mining Reclamation and Enforcement (OSM) from an Administrative Law Judge's decision denying OSM's motion to dismiss Mauersberg Coal Company's (Mauersberg) application for temporary relief and vacating Cessation Order No. 79–I–68–2, issued to Mauersberg for failure to complete the required remedial action set forth in interim step No. I of Notice of Violation No. 79–I–68–3. The Administrative Law Judge found that the modified abatement period contained in the notice was not reasonable and extended the abatement period for the purpose of providing time in which to establish a proper period for abatement. Subsequently, on Dec. 19, 1979, in response to OSM's motion for clarification, he indicated that the effect of his original decision was to vacate Cessation Order No. 79–I–68–2. We disagree with the Judge's conclusions and reverse for the reasons set forth below.

Factual and Procedural Background

On Oct. 25, 1979, OSM inspectors, pursuant to the Surface Mining Control and Reclamation Act of 1977 (Act),[1] inspected Mauersberg's Minich mine, located in Clarion County, Pennsylvania, and permitted by the State under permit Nos. 344–39 and 39(A). As a result of this inspection Notice of Violation No. 79–I–68–3 was issued to Mauersberg for conducting surface coal mining operations outside the permit area without approval from the State, as required by 30 CFR 710.11(a)(2).[2]

---

[1] 30 U.S.C. §§ 1201–1328 (Supp. I 1977).

On Nov. 15, 1979, OSM conducted a followup inspection which resulted in the issuance of Cessation Order No. 79–I–68–2 for failure to abate the violation as required by interim step No. 1 of the notice. On Nov. 23, 1979, Mauersberg filed an application for temporary relief with the Hearings Division, pursuant to 43 CFR 4.1262.[3] A hearing was held on Nov. 29, 1979, at which time OSM filed a motion to dismiss the application for temporary relief. In his Nov. 30, 1979, decision the Administrative Law Judge denied OSM's motion to dismiss, found the abatement period granted by OSM to be unreasonable, and extended the abatement period until Dec. 7, 1979, for the purpose of providing time in which the parties could agree on a reasonable period of abatement. After the Judge's clarification order stating that the effect of his original decision was to vacate Cessation Order No. 79–I–68–2, OSM brought this appeal.

Discussion and Conclusions

In its appeal from the Administrative Law Judge's decision, OSM contends that he erred (1) in failing to dismiss the application for temporary relief because it failed to provide the specific information required by 43 CFR 4.1263, and (2) in granting temporary relief where the elements of sec. 525(c), 30 U.S.C. § 1275(c) (Supp. I 1977), of the Act and 43 CFR 4.1263 were not proved by the applicant. We agree.

[1] An application for temporary relief must show on its face that the applicant is entitled to that relief. 43 CFR 4.1263, which implements sec. 525(c) of the Act, requires that the contents of an application for temporary relief include:

> (a) A detailed written statement setting forth the reasons why relief should be granted;
>
> (b) A showing that there is a substantial likelihood that the findings and decision of the administrative law judge in the matters to which the application relates will be favorable to the applicant;
>
> (c) A statement that the relief sought will not adversely affect the health or safety of the public or cause significant, imminent environmental harm to land, air, or water resources;
>
> (d) If the application relates to an order of cessation issued pursuant to section 521(a)(2) or section 521(a)(3) of the Act, a statement of whether the requirement of section 525(c) of the Act

---

[2] The remedial action contained in the NOV required that the affected area off the bonded permit area be regraded to approximate original contour, and that: (1) topsoil be redistributed; (2) drainage controls be provided; and (3) these areas be seeded or planted during the first period favorable for vegetation. The time for abatement was set for Feb. 14, 1980. The notice was modified the same day to establish two interim steps for the required remedial action. Interim step No. 1 encompassed the backfilling, regrading, and drainage control work, while interim step No. 2 encompassed the seeding and vegetative cover requirements. The notice was further modified on Oct. 26, 1979, to establish abatement periods for the interim steps: 10 a.m. on Nov. 15, 1979, for interim step No. 1; and 10 a.m. on Feb. 14, 1980, for interim step No. 2.

[3] The application failed to state the specific relief requested; however, the Administrative Law Judge, in his decision, indicated that statements by counsel for the applicant revealed that the relief requested was from imposition of an automatic fine for failure to abate a violation within the time set in the notice, as provided in 30 CFR 723.14.

for decision on the application within 5 days is waived; and

(e) A statement of the specific relief requested.

In the instant proceeding, Mauersberg's application contained none of the elements required by the regulation. Instead, the application stated in its entirety: "Mauersberg Coal Company respectfully requests a public hearing and temporary relief of Cessation Order No. 79-I-68-2." The inadequacy of the application was addressed in OSM's motion to dismiss, and the Judge should have granted the motion and dismissed the application.

[2] Assuming, *arguendo*, that the Administrative Law Judge need not have dismissed the application, it was nevertheless error to grant emporary relief after the hearing, ecause the applicant failed to prove the elements of sec. 525(c) of he Act.[4]

In the instant case Mauersberg failed to show that there was a sub- tantial likelihood that the findings of the Secretary would be favorable o it. Rather, the evidence indicates hat it had little or no likelihood of success on the merits. In fact, the Administrative Law Judge stated: "There can be little doubt from the evidence adduced at hearing that coal mining operations were being conducted off the permit area" (Decision, p. 3). He added: "Because it is quite clear that some mining was being done off the permit area, there is little likelihood that the applicant will prevail on the issue of the alleged violation" (Decision, p. 4). In addition, there was no showing or finding that the granting of temporary relief would have no adverse effect upon public health or safety or would cause no significant environmental harm. Thus, since Mauersberg failed to present any evidence to support the necessary findings, the decision of the Administrative Law Judge is unsupported by the evidence.

Therefore, it was error for the Administrative Law Judge to deny OSM's motion to dismiss and to vacate Cessation Order No. 79-I-68-2, and his decision of Nov. 30, 1979, is hereby reversed.[5]

Newton Frishberg
Administrative Judge

Melvin J. Mirkin
Administrative Judge

Will A. Irwin
Chief Administrative Judge

---

[4] Sec. 525(c) provides that in order for emporary relief to be granted there must be finding that:

"(1) a hearing has been held in the locality the permit area on the request for tem- orary relief in which all parties were given an pportunity to be heard;

"(2) the applicant shows that there is sub- antial likelihood that the findings of the ecretary will be favorable to him; and

"(3) such relief will not adversely affect the alth or safety of the public or cause signifi- nt, imminent environmental harm to land, r, or water resources."

[5] In reversing the decision the Board denies Mauersberg's request for joinder of parties involved in an alleged bankruptcy proceeding. The Board further declines to stay the commencement or continuation of the present action because of that alleged bankruptcy. *See* 11 U.S.C.A. § 362(b)(4) (West Supp. 1979).

APPEAL OF LAMAR D. CONSTRUCTION CO.

IBCA-1224-11-78

Decided *May 20, 1980*

Contract No. H50C14200288, Bureau of Indian Affairs.

Sustained in Part.

1. Contracts: Construction and Operation: Allowable Costs

Where performance by a construction contractor was timely completed and no issue of liquidated damages is presented, an unforseeable, area-wide cement shortage causing increased cost to the contractor will not entitle the contractor to a compensatory adjustment.

2. Contracts: Disputes and Remedies: Jurisdiction

The Board has no jurisdiction to reform a contract which is not governed by the provisions of the Contract Disputes Act of 1978. Therefore, where the contract is not under that Act, and a construction contractor presents some evidence in support of a claim that the method of testing, employed by the Government to determine the compressive strength of structural concrete, is unfair, resulting in wrongful monetary penalties, but fails to allege or prove that the Government did not comply with the contract specifications in performing such testing, the Board will find such claim to be a request for reformation of the contract and will dismiss the claim for lack of jurisdiction.

3. Contracts: Construction and Operation: Changes and Extras

The Board finds that constructive changes occurred: (1) when the Contracting Officer's Representative directed the contractor to pour concrete into forms, slightly out of compliance, but approved by him with knowledge that some overruns might result; and (2) when the contract documents did not specify the requirement for construction of diversion works at certain sites, neither of the contracting parties being aware of the need for such construction until flooding by upstream activities of third parties, and the Contracting Officer's Representative ordered the diversion works constructed which was necessary to complete the project, advised the contractor that it would be paid for the extra costs incurred, and notified the Contracting Officer by letter which enclosed a copy of the project plans with the diversion channels for the extra construction drawn in.

APPEARANCES: Hugh C. Garner and Roger P. Christensen, Esqs., on behalf of LaMar D. Construction Co.; Fritz Goreham, Esq., Department Counsel, Phoenix, Arizona, on behalf of the Government.

OPINION BY ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF CONTRACT APPEALS

Background

This appeal stems from a contract, dated June 20, 1977, between the United States Department of the Interior, Bureau of Indian Affairs (BIA), and LaMar D. Construction Co., of Altamont, Utah (appellant) for the construction of six box culverts and the installation of three arch plate pipe culverts on the Uintah and Ouray Indian reservation, Duchesne and Uintah Counties, Utah. The contract price was for $202,810.21. The construction performance was considered timely and substantially complete on Oct. 27, 1977. It was accepted as final on Nov. 12, 1977, without the incurrence of liquidated damages.

However, certain disputes developed between the parties involving claims by appellant of changed conditions, overruns of concrete, unforseeable cement shortages, and erroneous testing of concrete compressive strength. All of such claims were denied by the Contracting Officer (CO) in his findings of fact and decision dated Sept. 27, 1978. The appellant appealed from that decision by filing a timely notice of appeal on Oct. 27, 1978, with the Contracting Officer who transmitted the same to this Board on Nov. 16, 1978.

The appellant, by its complaint set forth four claims for relief totalling $25,070.25, and a fifth claim requesting interest on the total amount found due as provided by law. The four specific claims may be summarized as follows: (1) That between the times of its initial bid and when ready to make the first concrete pour—May and Aug. of 1977—an unforeseeable statewide and regional shortage of cement products was encountered; that as a result, appellant was required to locate and purchase "bag cement" in piecemeal fashion instead of by bulk quantities as planned; that the result was an increased cost of $13 per cubic yard for 445 cubic yards of concrete specified in the project plans, totalling $5,785. (2) That appellant established a quality control plan to assure that the structural concrete required by the specifications would meet the specified minimum compressive strength of the concrete at 3,000 lbs. per square inch in 28 days; that the mix formula was approved by the Contracting Officer's Representative (COR), and calculated to meet the required compressive strength; that the formula used by BIA as set forth in sec. 558-1 (FP-74) at page 205, is unfair in that it permits the BIA to arbitrarily pick the lowest test results in arriving at the average compression strength of a given lot; that at sites 2, 5 and 9, BIA erroneously discounted the pay factors resulting in a loss to appellant of $4,325.95, based upon the accepted quantity of 102.57 cubic yards of concrete poured at those sites. (3) That there was an overrun of item 558 (2), structural concrete, of 55 cubic yards because of reliance upon directions of the COR and project inspector to make the concrete pours regardless of overruns and that overruns amounting to less than 25 percent would be compensable. However, in this claim, appellant refers to Exhibit I, attached to the complaint and concedes that that exhibit, a memo dated Dec. 27, 1977, written by the COR, shows that 14.5 cubic yards were wasted, but alleges that the COR ordered an additional 2 cubic yards at site No. 9 to assure sufficient quantity but that these 2 cubic yards were never used and eventually dumped at a loss to the appellant. Nevertheless, appellant claims a total of 55 cubic years at $179.26 per cubic yard for a total of $9,859.30. (4) That extra work was required to be performed by appellant for the construction of diversion works during the course of construction but which was not shown on the working plans. Appellant alleges that an irrigation company, not having been informed by the Government of the construction project opened its gates upstream and inundated the construction sites, and that site 8, previously dry for more than 13 years, was flooded by a new mining works upstream from the site. Appellant further alleges that it was directed by the COR to construct all diversion works necessary to protect the sites and was told by him that BIA would pay for the work as an apparent "differing site condition." Appellant claims $5,100 for these additional costs.

By way of answer to appellant's complaint, the Government entered a general denial and incorporated therein by reference the decision of the CO as stating the Government's position on each point raised by appellant in its complaint.

Neither party requested a hearing in this matter and neither party submitted supplements to the record nor briefs pursuant to the order settling the record issued by the Board. Appellant did, however, attach to its complaint Exhibits A–R and did submit a supplemental brief along with its complaint. This appeal, therefore, was submitted to the Board on the record which consists of the appeal file and the aforesaid exhibits attached to appellant's complaint.

Discussion of the Evidence

One of the principal items of evidence relied upon by appellant is the unrefuted affidavit of Mr. Bert D. Ames, dated Jan. 20, 1979 (Appellant's Exh. E). He stated therein that he is a licensed general contractor in the State of Utah, but for the 4-year period prior to the subject project had worked for appellant in various capacities. For this project, he served as superintendent. He stated, with respect to claim No. 1, that he personally supervised the construction work at all of the nine project sites and "worked on a near—daily basis with Tony Zufelt, Project COR, and Vernon Russell, Project Inspector"; that because of the shortage of ready mix cement products in the State of Utah, he was required to purchase "bagged cement," haul it to the work sites and manually mix it with the sand, gravel, and water mixture delivered in ready mix trucks; that, with respect to claim No. 2, appellant had worked in the field of highway and bridge construction for approximately 12 years and has had considerable experience in cement mixing and structural concrete; that from this experience and by personal supervision of the mixing and pouring of the structural concrete, he had no doubt that a minimum test strength of 3,500 to 5,000 lbs. per square inch resulted by virtue of the concrete mix formula used

y appellant at the nine project
te; that, with respect to claim No.
, the concrete forms were approved
y either the Project COR or the
nspector; that during or around
he time of the second concrete pour
becomes evident that greater
mounts of structural concrete
ould be required than estimated
the invitation for bids or by the
roject specifications and calcu-
ited an overrun of about 61 cubic
ards; that the COR was advised
f the expected overruns, and after
pparently contacting the CO the
OR assured affiant that overruns
ere expected in projects of this
ind and that overruns amounting
less than 25 percent were reim-
ursable by the BIA; that in re-
ance upon those representations,
fiant continued to make concrete
ours in conformance with the
orms as approved by the project
OR and/or the Inspector; that
hile some concrete was lost by
onuse, 2 cubic yards were lost be-
ause of instructions from the COR
make available 2 additional cubic
ards to assure a complete pour at
e remote site No. 9 prior to the
eather turning colder, but the 2
ibic yards were not needed and
ventually dumped; that, with re-
pect to claim No. 4, after review of
e project plans he concurred with
r. Stevenson (LaMar D. Steven-
n, owner of the appellant com-
any), prior to construction, that
version channels were not re-
ired by the plans at site Nos. 4, 5,
6, 7, and 8 and that the canals and washes at those sites would not contain water during the construction period; that those sites were flooded out during the course of construction because of the diversion of large amounts of water into the canal by Dry Gulch Irrigation Co. and at site No. 8 by water from a newly started mining operation upstream; that it was later learned that these parties had not been informed by BIA of the construction being performed by appellant; that the COR was surprised at the water in the canal so late in the season, was unaware of the mining operation, and wrote a letter to the CO expressing a need for extra diversion works and recommended that appellant be paid for the additional work; that attached to that letter was a copy of the project plans with "drawn in" diversion channels.

The remaining exhibits attached to appellant's complaint generally support the allegations of the cement shortages, that extra work was required for diversion works; that overruns occurred with regard to quantities of concrete poured, and that independent engineers agree with appellant that BIA's method of computing compressive strength of poured concrete was unfair (Appellant's Exhs. A–D and F–R).

The Government offered no evidence to support the record by way of documentary exhibits or testimony by affidavit. It relied solely on the appeal file and the position stated by the Contracting Officer in his findings of fact and decision.

Findings of Fact and Conclusions

Based upon the evidence discussed above and the entire record presented, the Board finds, concludes, and decides with respect to each of the claims presented as follows:

Claim No. 1—Extra Costs Incurred as a Result of Unforeseen Shortages of Cement

[1] We find that there was indeed an unforeseeable cement shortage which may have resulted in extra costs to appellant. We conclude, however, that, as a matter of law, no compensatory allowance for this claim is available to appellant. We believe that appellant has clearly proved excusable cause for delay, had there been a delay in the performance of the contract because of the unforeseen cement shortages, but performance was timely completed and no issue of liquidated damages presented. No legal authority was cited by appellant showing entitlement to a compensatory adjustment in this circumstance and we know of none. Therefore, claim No. 1 is denied.[1]

Claim No. 2—Unfair Testing Method Used by BIA to Determine Compression Strength of Concrete

[2] The contracting officer expressed in his decision the view that appellant did not understand the quality control specifications pertaining to the testing of concrete for compressive strength and misapplied the formula to questioned samples. Nevertheless, the only evidence offered by appellant for this claim was the opinion of Mr. Ames in his affidavit (Appellant's Exh. E) that he was especially careful to mix the concrete to assure that the pounds per square inch of compression would meet specified requirements and the hearsay views of independent engineers as stated in a letter from appellant to the (CO) (Appellant's Exh. N) that there is one common method of obtaining the average test break: "Disregard any outstanding low cyl breaks and average the rest." Appellant neither alleged nor proved that BIA did not follow the specifications in making the pay factor calculations resulting in penalties assessed against four different concrete pours. Likewise appellant neither alleged nor proved that it was singled out from other contractors and treated any differently by BIA in calculating pay factors for the concrete pours. In fact, the crux of this claim is simply that the method employed by BIA was unfair. The Board views this claim as a request to reform the contract. Since this contract does not come within the provisions of the Contract Disputes Act of 1978, our jurisdiction does

---

[1] *See Irwin & Leighton* v. *U.S.*, 101 Ct. Cl. 455 (1944); *Appeal of Marden Corp.*, ASBCA 8934 (1963), 1963 BCA par. 3938.

not include reformation authority.[2] Therefore, claim No. 2 is dismissed.

Claim No. 3—Overrun of Structural Concerete

[3] We find from the evidence that, because the COR directed the appellant to make the concrete pours into forms previously approved by him, an overrun of 55 cubic yards resulted. This constituted a constructive change entitling appellant to an equitable adjustment.[3] However, by its complaint appellant admits that Exhibit I shows that 14½ cubic yards were wasted and has proved to our satisfaction that 2 cubic yards were wasted as a direct result of an order by the COR. Therefore we find that the equitable adjustment should be based upon the 55 cubic yards of overrun minus the net 12½ cubic yards wasted or a total of 42½ cubic yards of overrun. We further find that because of the constructive change, appellant is entitled to be paid its actual cost of the overrun, which, because of the cement shortage, was not the unit bid price of $179.26 per cubic yard, but rather $192.26. This allows for the $13 per cubic yard of increased price for the bagged cement. Therefore, we hold that appellant is entitled to an equitable adjustment for 42½ cubic yards of overrun at $192.26 per cubic yard or a total of $8,341.05 for claim No. 3.

Claim No. 4—Cost of Construction of Extra Diversion Works

We find, based upon the unrefuted affidavit of Mr. Ames (Appellant's Exh. N), the (CO) findings of fact and decision, and appellant's Exhs. M, N, P, and R as follows: (1) that the contract plans did not specify construction of diversion works at sites 4, 5, 6, 7, and 8; (2) that such construction was obviously necessary to complete the project and was directed to be done by the COR after the flooding activities of the irrigation company and mining operation upstream were discovered; (3) that notice to the contracting officer of the claim for this additional work was duly given and that such claim was denied by him.

The CO relied upon the application of the technical, general provisions of the specifications for his denial of this claim, asserting that the claim was for work included in the contract plans. The specific language, which he quoted in his denial (Appellant's Exh. R) is taken from FP-74 section 206.01 and the special provisions of the technical specifications, and reads as follows:

> This work shall include necessary bailing, pumping, draining, sheeting,

---

[2] P.L. 95–563, 92 Stat. 2383, 41 U.S.C. A. §§ 601–613 (West Supp. 1980). Although ec. 8(d) of that Act authorizes agency boards f contract appeals "to grant any relief that ould be available to a litigant asserting a ontract claim in the Court of Claims" the ct does not apply to claims upon which the nal decision of the (CO) was issued prior to ar. 1, 1979. *See Appeal of L. M. Johnson, nc.*, IBCA–1268–5–79 (Sept. 28, 1979), 86 D. 508, 79–2 BCA par. 14,070.

[3] *See Appeal of Environmental Consultants, c.*, IBCA–1192–5–78 (June 29, 1979), 86 D. 349, 79–2 BCA par. 13,937.

> bracing, and the necessary construction of cribs and coffer dams and placing of all necessary backfill.
>
> * * * * *
>
> This work also includes the construction, maintenance, and removal of canal and stream diversions and road detours as stated in subsection 104.04, maintenance for traffic at the site shown on the plans.

We are not convinced that the CO was justified in relying upon the aforequoted language to hold the contractor responsible for the construction of the diversion works as being included in the original project. The record here indicates, and we find, that neither of the contracting parties was aware of any need for construction of the subject diversion works until the flooding by the upstream activities actually occurred, which was after the contract had been awarded and the project work partially performed. We further find that the diversion works construction at the subject sites was, in fact, extra work beyond the scope of the contract plans and specifications as contemplated by the parties.

We conclude that a constructive change occurred when the COR ordered that the work be done, advised the appellant that it would by paid for the cost thereof, and notified the CO by sending him a letter enclosing a copy of the project plans with the diversion channels for the extra construction "drawn in."[6]

The proof of quantum, presented by appellant, itemized the costs for this claim in the total amount of $5,100 and was not challenged by the Government. Therefore, we hold that appellant has made out an unrebutted prima facie case for entitlement to an equitable adjustment, on the ground of constructive change, for the full amount of claim No. 4.

Decision

Accordingly, it is the decision of this Board: That appellant's claim No. 1 is denied; that claim No. 2 is dismissed; that claim No. 3 is sustained in part, in the amount of $8,341.05; that claim No. 4 is sustained in the full amount of $5,100; and that appellant, in addition, is entitled to interest on $13,441.05 pursuant to the interest clause of the contract and as provided by law.

DAVID DOANE
Administrative Judge

We concur:

WILLIAM F. MCGRAW
Chief Administrative Judge

G. HERBERT PACKWOOD
Administrative Judge

ADDINGTON BROTHERS MINING, INC.

2 IBSMA 90

Decided *May 22, 1980*

Petition for discretionary review by Addington Brothers Mining, Inc., of a

---

[6] *Id.*

Dec. 14, 1979, decision by Administrative Law Judge Joseph E. McGuire in Docket No. NX 9-29-P, holding that Notice of Violation No. 79-II-15-2 was properly issued, but reducing the resulting civil penalty.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Generally—Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Hearings Procedure

Under 43 CFR 4.1153 OSM has an absolute right to submit an answer to a petition within 30 days from receipt of a copy of the petition. After that time, the Administrative Law Judge has discretion to regulate the scope of the answer in any reasonable manner.

APPEARANCES: Roy F. Layman, Esq., Ashland, Kentucky, for Addington Brothers Mining, Inc.; John P. Williams, Esq., Office of the Field Solicitor, Knoxville, Tennessee, Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Mark Squillace, Esq., and Donald C. Baur, Esq., Office of the Solicitor, Washington, D.C., all for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

Pursuant to the Surface Mining Control and Reclamation Act of 1977 (Act),[1] on Feb. 13, 1979, inspectors from the Office of Surface Mining Reclamation and Enforcement (OSM) inspected Addington Brothers Mining, Inc.'s (Addington's), Paint Creek No. 4 surface mine in Morgan County, Kentucky. OSM issued Notice of Violation No. 79-II-15-2 to Addington for allegedly allowing spoil and debris to remain on the downslope in violation of 30 CFR 716.2.[2]

OSM notified Addington that it was proposing a civil penalty of $1,700 for the violation. Addington requested an assessment conference with OSM which was held on May 21, 1979. As a result of that conference, the proposed assessment was raised to $2,400.

Addington filed a timely petition for review of the proposed assessment with the Hearings Division. OSM's answer was filed on the 36th day after it received the petition. At the hearing, held on July 27, 1979, Addington moved to strike OSM's answer and to be granted a default judgment. Addington based its motion on the argument that 43 CFR 4.1153 required OSM to file its answer within 30 days of the filing of the petition. The Administrative Law Judge denied the motion but accepted the suggestion of OSM's counsel that the issue be discussed

---

[1] 30 U.S.C. §§ 1201-1328 (Supp. I 1977).

[2] This is the special initial performance standard applicable to surface coal mining operations on steep slopes. Addington did not appeal the Administrative Law Judge's determination that sustained the violation of this regulation.

best copy available

in posthearing briefs.[3] In a commendably thorough opinion issued on Dec. 14, 1979, the Administrative Law Judge held that 43 CFR 4.1153 was a procedural directive over which he had discretion[4] and upheld the issuance of the notice of violation, but reduced the civil penalty to $2,100.

Addington timely appealed this decision and briefs from both parties have been received.

Discussion and Conclusion

Addington bases its appeal on OSM's late filing of its answer. There is no dispute that the filing was late under 43 CFR 4.1153. The issue concerns the consequences of such a late filing. Addington contends that the answer should be stricken and a default judgment granted against OSM. OSM argues that Addington was not prejudiced by the late filing and that a default judgment is inappropriate.

[1] 43 CFR 4.1153 provides that "OSM *shall have* 30 days from receipt of a copy of the petition within which to file an answer to the petition with the Hearings Division, OHA." (Italics added.) Within that time OSM is entitled to file a brief. After that time has run. OSM no longer possesses such an absolute right. The Administrative Law Judge then has discretion to regulate the scope of the answer in any reasonable manner.[5] In the event the Administrative Law Judge finds that the petitioner has been disadvantaged, he may issue whatever order is required to correct the situation. Certainly he may receive an answer, without sanctions, at any time prior to a suitable motion by the petitioner. This is what the Administrative Law Judge did in this case, and we see no reason to fault him.

The Dec. 14, 1979, decision on the Administrative Law Judge is affirmed.

Will A. Irwin
Chief Administrative Judge

Melvin J. Mirkin
Administrative Judge

Newton Frishberg
Administrative Judge

---

[3] Tr. at 5–6, 64–65.

[4] Decision of Dec. 14, 1979, in Docket No. NX 9–29–P, at p. 11:

"The rule at issue, 43 CFR 4.1153, is unquestionably one of a procedural nature and thus the general rule to the [*sic*] applied is that of finding that it is always within the discretion of a court of [*sic*] an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it. The action of either in such a case is not reviewable except upon a showing of *substantial prejudice* to the complaining party, *Health Systems Agency of Oklahoma, Inc.* v. *Norman*, 589 F. 2d 486 (10th Cir. 1978); *American Farm Lines* v. *Black Ball Freight Service*, 397 U.S. 532, 25 L. Ed. 2d 547 (90 S. Ct. 1288); *N.L.R.B.* v. *Monsanto Chemical Company*, * * * [205 F. 2d 763 (8th Cir. 1953)]."

[5] *See, e.g., Warr* v. *Norton*, 190 Okla. 114, 121 P. 2d 583, 584 (1942).

U.S. GOVERNMENT PRINTING OFFICE : 1980 O - 323-081

best copy available

ADMINISTRATIVE APPEAL [illegible]

[illegible]

[illegible]

APPEARANCES: [illegible]

[illegible]

[illegible]

[illegible] judgment is inappropriate.

[illegible]

[illegible] Administrative Judge

[illegible] Administrative Judge

[illegible] Administrative Judge

[illegible]

ADMINISTRATIVE APPEAL OF MARLIN D. KUYKENDALL

v.

PHOENIX AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS, AND YAVAPAI–PRESCOTT TRIBE

8 IBIA 76

Decided *June 2, 1980*

Appeal from decision by Area Director permitting lease of Indian trust lands to be cancelled by tribe without approval of the Secretary.

Reversed.

1. Indian Lands: Leases and Permits: Long-term Business/Agriculture: Cancellation

Where a business lease between tribe and automobile dealer contains a cancellation clause providing for alternative remedies in case of breach of the agreement by lessee, use of the phrase "and/or" in reference to the various alternatives cannot reasonably be construed to be a delegation to the tribe of Secretarial authority to cancel the lease in the event of breach of the lease by the lessee. Nor does the existence of alternative remedies in the lease constitute Secretarial consent that the tribe undertake to administer the lease without agency participation contrary to Departmental regulations.

2. Indian Lands: Leases and Permits: Long-term Business/Agriculture: Cancellation

Where Departmental regulations at 25 CFR Part 131 are incorporated by reference as part of the lease, those regulations are to be applied in the administration of the lease as though fully set out in the written lease agreement. The regulations incorporated into the lease become binding upon the parties. The agency may not ignore nor act contrary to the provisions of the incorporated regulations which require Secretarial consent to cancellation of the lease, subject to certain specified due process requirements set out in the regulations.

3. Indian Lands: Leases and Permits: Long-term Business/Agriculture: Cancellation

A collateral attempt by a tribal court to cancel appellant's lease by entry of a declaratory judgment that appellant "materially breached the lease" is ineffective to result in cancellation since the judgment goes beyond the subject matter jurisdiction of the court to enforce.

APPEARANCES: Thomas J. Reilly, Esq., for appellant; Robert Moeller, Esq., for appellee, Commissioner of Indian Affairs; Philip E. Toci, Esq., for appellee, Yavapai-Prescott Tribe.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

INTERIOR BOARD OF INDIAN APPEALS

Factual and Procedural Background

On Sept. 11, 1969, the Superintendent of the Truxton Canyon Agency executed a lease on behalf of the Yavapai-Prescott Community Association with Appellant Kuykendall for a tract of land in Prescott, Arizona, to be used for an automobile agency. The lease incorporates 25 CFR Part 131 by reference, and provides, in the default provisions of the lease, for 30- and 60-day grace periods, following notice of default, during which time appellant shall be permitted to cure any claimed breach of the lease before termination may be sought.[1]

Appellant's initial performance under the lease became the cause for several notices in 1970 and 1971 from the Agency Superintendent that there was failure to make timely survey, failure to provide a plat on time, failure to pay rent on time, failure to show proof of insurance, and failure to begin construction as scheduled. By late 1971, however, it appears the initial problems had been overcome; appellant had built a $200,000 garage building on the leased land; the land had been surveyed and found to contain 4 instead of 2 acres.[2] A plat had been furnished, and insurance premiums and rents were being paid.

In 1975 appellant subleased the auto business to Jay Piccinati, without, apparently, any prior consultation with the tribe.[3]

In October 1975, the Agency Superintendent gave appellant notice his sublease to Piccinati was considered to be a breach of his lease with the tribe. The matter was negotiated and finally settled. Also in 1975 the tribe enacted a sales tax ordinance which taxed retail sales on the reservation. In 1977 Piccinati returned the auto business on the leased land to appellant, who during the time of the Piccinati operation had failed to make the agreed lease payments for September 1976, and had failed to make an interest payment claimed to be due on late rents. Appellant had charged Piccinati $2,400 monthly rent, during part of the sublease, although he informed the tribe the rent was to be $1,400.[4]

In March 1979 the partnership of Smith and Henkel subleased the auto business from appellant. Preliminary negotiations involved obtaining the approval of the new operators by the auto manufacturers concerned. While this transaction was going on, appellant claims to have notified the tribal business manager of the proposed sublease and the negotiations for the sale of the business. The manager, however, denies that he was told about the sale and new sublease. Smith and Henkel agreed to pay Appellant Kuykendall $200,000 for the business, subject to tribal approval of the sublease, with the understanding appellant would remain primarily liable for the lease payments and would continue to deal with the tribe concerning the lease.

On Mar. 9, 1979, a form of sublease was presented by appellant to the tribe for approval. The tribe refused to approve the sublease, and demanded more information about the partners, which was supplied. When the tribe discovered that Smith and Henkel had formed a corporation (primarily for tax purposes), it refused to approve the sublease for that stated reason.

---

[1] 25 CFR 131.14 provides the lessee shall have a "reasonable" cure time.

[2] Resulting in a doubling of the lease payments to $1,600 from $800.

[3] The former association is now a tribe. 45 FR 27828 (Apr. 24, 1980).

[4] The tribe takes the position it is entitled to charge sales tax on the rental. It claims $3,000 due on this account.

On Apr. 6, 1979, the tribe informed appellant the sublease was disapproved, and notified him the sublease was a breach of the lease with the tribe. He was notified that, to cure the breach, he must remove Smith and Henkel and retake the dealership himself. Also on April 6 the tribe notified Smith and Henkel they were in wrongful possession of tribal land. They were given 15 days to obtain an approved sublease or be removed from the land.

On May 16, 1979, the tribe agreed that Smith and Henkel should remain in possession of the leased land; on June 6, 1979, however, they were again notified to quit the property.

On June 27, 1979, appellant was notified by the tribal attorney that his lease with the tribe was terminated. On Sept. 11, 1979, appellant made his annual lease payment to the Truxton Canyon Agency; it was accepted, but later returned.[5] Prior to this transaction, on Aug. 30, 1979, the Area Director had opined in writing that the lease cancellation by the tribe was validly done and was "not subject to our intervention or to our administrative determination."[6]

On Sept. 20, 1979, the tribe approved a law and order code creating a tribal court, which the Truxton Canyon Agency Superintendent approved the same day. An undated form of small claim summons and complaint was served on appellant on Oct. 24, 1979, summoning him to a trial in the newly constituted tribal court on Nov. 26, 1979, in an action brought against him by his sublessees Smith and Henkel for declaratory judgement. Appellant refused to appear, but instead chose to challenge the jurisdiction of the court, questioning that it was properly constituted by appealing from the Superintendent's order of September 20, which approved the code and established the court. Finding Kuykendall in default, the tribal court on Feb. 1, 1980, ordered the improvements on the leased land (the $200,000 auto agency) "forfeited." The Smith-Henkel sublease with Kuykendall was declared "a nullity," and any possessory right of Smith and Henkel was found to depend upon the will of the Yavapai-Prescott Tribe.[7]

---

[5] A memo in the file indicates that this was not a lapse on the part of the agency. The matter was apparently decided only after consultation with Area Director's office.

[6] The appeal is taken from that determination.

[7] Earlier, the U.S. District Court for Arizona, in *Kuykendall* v. *McGee*, Civ. No. 79–834 (D. Ariz. Jan. 28, 1980), found that appellant had failed to exhaust his administrative remedies with the Department concerning the lease termination, and dismissed his action for declaratory judgment and injunction against the tribe. In dicta in his order, the Judge assumes the lease provides a clause permitting terminations by the tribe. Since he directly finds, however, in support of his judgment, that appellant failed to exhaust his administrative remedy and that the lease properly incorporates the termination provisions of 25 CFR

(Continued)

Issue on Appeal

On May 8, 1980, this Board determined the interest of administrative economy would be best served by resolution of the apparent threshold issue: Whether a business lease granted by an Indian tribe with approval of the Secretary pursuant to the provisions of 25 U.S.C. § 415 (1976), may be terminated by the tribe without Secretarial approval or action. The Board finds that the lease may not be cancelled without Secretarial approval.

Discussion and Conclusions

[1] The first paragraph of the Sept. 11, 1969, lease provides:

> THIS CONTRACT is made and entered into this 11th day of September, 1969, by and between *The Yavapai-Prescott Community Association* hereinafter called the Lessor, whose address is *P.O. Box 1390, Prescott, Arizona*, and *Marlin D. Kuykendall*, hereinafter called the Lessee, whose address is *P.O. Box 911, Prescott, Arizona*, under the provisions of the Act of August 9, 1955 (69 Stat. 539) as implemented by Part 131, Leasing and Permitting, of the Code of Federal Regulations, Title 25—Indians, and any amendments thereto which by reference are made in part hereof. [Italics in original.]

The incorporation by reference of regulations into Federal contracts is an established procedure in Government contracting. Such provisions in Government contracts are upheld by the courts, which recognize the practice to be binding upon the contracting parties.[8] One of the incorporated regulations, 25 CFR 131.14, requires that termination for breach of a lease entered into under authority of the regulations appearing at Part 131 is subject to Secretarial approval.[9]

Despite the requirements of 25 CFR 131.14, the Yavapai-Prescott Tribe, relying upon numbered Clause 30, DEFAULT, of the September lease, argues that the Secretary delegated to the tribe the power to cancel the lease when language was inserted into the lease in Clause 30 that "then Lessor and/or the Secretary may either * * * [elect to

---

(Continued)
Part 131, this apparent inconsistency properly refers only to the issues respecting tribal sovereignty raised in the Federal case. To find otherwise would make the court's holding meaningless, since the issue referred to this agency (whether this lease was terminated) would otherwise have been decided by the District Court.

[8] *Cafeteria and Restaurant Workers Union, Local 473, AFL–CIO* v. *McElroy*, 367 U.S. 886 (1961); *Rehart* v. *Clark*, 448 F.2d 170 (1971) (for a decision holding applicable regulations to apply to a Government contract, even though not actually incorporated by specific reference, *see G. L. Christian and Assoc.* v. *United States*, 312 F.2d 418, 427, *rehearing denied*, 160 Ct. Cl. 58, (1963), *cert. denied*, 375 U.S. 954 (1963), *rehearing denied*, 376 U.S. 929 (1964)).

[9] *See also* 25 CFR 131.5 and 131.12 for further limitations concerning leasing and the power of the Secretary, generally. The statute implemented by these regulations, the Act of Aug. 9, 1955, 69 Stat. 539, 25 U.S.C.A. § 415 (West Supp. 1980), provides in pertinent part:

"(a) Any restricted Indian lands, * * * tribally * * * owned, may be leased by the Indian owners, with the approval of the Secretary of the Interior, for * * * business purposes, * * * as determined by said Secretary. All leases so granted shall be for a term of not to exceed twenty-five years, except leases of land * * * on the * * * Yavapai-Prescott Community Reservation * * * which may be for a term of not to exceed ninety-nine years, * * *. Leases for * * * business purposes * * * may include provisions authorizing their renewal for one additional term of not to exceed twenty-five years, and all leases and renewals shall be made under such terms and regulations as may be prescribed by the Secretary of the Interior."

pursue a number of alternative remedies]."[10]

Both the Yavapai-Prescott Tribe and the Phoenix Area Director argue that the language in Clause 30 constitutes a delegation of Secretarial authority to the tribe to cancel the lease for default in the performance of the lessee.[11] It is difficult, in view of the general tenor of the lease document,[12] to accept their assumption that the use of the words "and/or" in Clause 30 constituted a delegation of Secretarial authority to administer leased trust property contrary to Departmental regulations. The fiduciary relationship of the Secretary to the tribe in such matters is fixed by the regulations required by statute[13] and defined by case law.[14] The phrasing of the second sentence of Clause 30, upon which the tribe relies for its stated position, while awkward, merely refers to the alternative actions to be taken to pursue the various remedies described in Clause 30 which are jointly available to the Secretary and the tribe. Nothing in the language used suggests the Secretary planned to terminate the trust relationship or relinquish the administration of the trust property to the tribe in the event appellant should default. Moreover, the conduct of the parties during the early administration of the lease confirms that the Secretary was not excused from his trust duties by defaults in the lease, but rather he was then required to administer the contract according to the terms respecting default.[15]

---

[10] Numbered Clause 30 provides:

"30. DEFAULT

"Time is declared to be of the essence of this lease. Should Lessee default in any payment of monies or fail to post bond, as required by the terms of this lease, and if such default shall continue uncured for the period of thirty (30) days after written notice thereof by the Lessor or the Secretary to Lessee, during which 30-day period Lessee shall have the privilege of curing such default, or should Lessee breach any other covenant of this lease, and if such breach shall continue uncured for a period of sixty (60) days after written notice thereof by the Lessor or the Secretary to Lessee, during which 60-day period Lessee shall have the privilege of curing such breach, then Lessor and/or the Secretary may either:

"A. Collect by suit or otherwise, all monies as they become due hereunder, or enforce, by suit or otherwise, Lessee's compliance with any other provisions of this lease, or

"B. Re-enter the premises and remove all persons and property therefrom excluding the personal property belonging to authorized sublessees, and either

"(1) Re-let the premises without terminating this lease, as the agent and for the account of Lessee, but without prejudice to the right to terminate the lease thereafter, and without invalidating any right of Lessor and the Secretary or any obligation of Lessee hereunder. Terms and conditions of such re-letting shall be at the discretion of Lessor and the Secretary, who shall have the right to alter and repair the premises as they deem advisable, and to re-let with or without any equipment or fixtures situated thereon. Rents from any such re-letting shall be applied first to the expense of re-letting, collecting, altering, and repairing, including attorney's fees and any real estate commission actually paid, insurance, taxes and assessments and thereafter toward the payment to liquidate the total due. Lessee shall pay to Lessor monthly, when due any deficiency, and Lessor and the Secretary may sue thereafter as each monthly deficiency shall arise.

"(2) Terminate this lease at any time and even though Lessor and the Secretary have exercised rights as outlined in (1) above. Exercise of this remedy shall exclude recourse to any other remedy, but shall not preclude recovery of amounts due to Lessor for the period prior to termination.

"C. Take any other action deemed necessary to protect any interest of Lessor. No waiver of a breach of any of the covenants of this

(Continued)

(Continued)

lease shall be construed to be a waiver of any succeeding breach of the same or any other convenant.

"Any action taken or suffered by Lessee as a debtor under any insolvency or bankruptcy act shall constitute a breach of this lease. In such event, the Lessor and the Secretary shall have the options set forth in sub-articles (1) and (2) herein, and furthermore, the Lessor is hereby declared to be a first preferred creditor, except as provided in Article 22."

[11] The Area Director argues at page 5 of his answer dated Nov. 9, 1979, that the use of the words "and/or the Secretary" are a delegation to the tribe of the power to cancel the lease, and, at page 6, observes that, "Nothing in 25 USC 415 prohibits the Secretary, through lease terms which he approves and has approved in the subject lease, from authorizing the tribe to terminate the lease for cause." The position taken by the tribe is more complex. The tribe assumes a delegation of Secretarial power and seeks to make the theory of tribal sovereignty dispositive of the issue here by stating the issue in the case to be:

"May an organized Indian tribe recognized by both Congress and the Secretary of the Interior, acting under a lease of tribal property which has been negotiated and approved by the Secretary of the Interior, exercise its sovereignty and right of self determination by terminating such lease for a material and substantial breach thereof by the lessor, in accordance with the terms of the lease, or is the sovereignty and self determination of the Tribe limited to the exclusive remedy of requesting the Secretary of the Interior to act in behalf of the Tribe by proceeding under the provisions of 25 CFR 131.14?" (Answer of the tribe dated Nov. 9, 1979, at page 4.)

[12] Clause 7 recites that the Secretary is the agent of the tribe for purposes of the lease; payments are to be made to the Secretary. Clause 8 provides accounting under the lease shall be made to the Secretary and tribe, jointly. Clause 10 provides that plans shall be jointly approved by the tribe and the Sec-

(Continued)

[2] Even had the Secretary wished to pursue such a course, he would have been prevented from doing so by the Departmental regulations appearing at 25 CFR Part 131. The agency is bound by its own regulations: Especially where these regulations insure that private citizens directly affected by Government action shall not be deprived of their interests without the due process protections furnished by the agency regulations.[16] In this situation appellant lessee of Indian land claims, correctly, that his lease cannot be cancelled except in conformity to the provisions of 25 CFR 131.14, which, in addition to due process safeguards concerning notice, includes a right of appeal to the Commissioner of Indian Af-

---

(Continued)

retary. Clause 12 provides that major construction shall be jointly approved. Clause 16 provides that required bonds shall be deposited with the Secretary. Clause 17 provides that a construction bond, in a form suitable to the Secretary may be required and that joint approval by the tribe and Secretary will be required prior to obligation of building loan agreements. Clause 19 requires joint approval of subleases. Clause 22 requires joint approval prior to encumbrancing. Clause 24 requires proof of payment to lienors to be furnished jointly to the tribe and Secretary. Clause 26 agrees to hold the tribe and the United States harmless from casualty claims. Clause 29 describes the effect arbitration under the lease may have upon actions by the Secretary. Clause 35 provides that all lessees' obligations under the lease are jointly owed to the tribe and the United States, so long as the land continues in trust status. Clause 41 provides for joint inspection of the leased premises by the tribe and the Secretary.

[13] 25 U.S.C. § 145 (1976).

[14] *See United States* v. *Jim*, 409 U.S. 80 (1972); *United States* v. *Shoshone Tribe of Indians*, 304 U.S. 111 (1938); *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1 (1831).

[15] From 1969 until 1978, notices to cure were given by the Superintendent. Thus, deficiency notices were sent by the Bureau of Indian Affairs (BIA) to appellant Apr. 20, 1970; Jan. 14, 1971; Jan. 22, 1971; Sept. 25, 1975; Dec. 7, 1976; and Dec. 30, 1976. The tribe's reaction to the sublease to Smith-Henkel in 1978 provided the first indication that the Sept. 11, 1969, lease was not regarded by the tribe as subject to BIA administration. For 9 years of the lease, however, the agency administered the lease for the tribe, and the tribe acquiesced in that arrangement.

[16] *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954); *United States* v. *Heffner*, 420 F.2d 809 (4th Cir. 1969).

fairs and to this Board.[17] (Suggestion is made in the record before the Board that the regulations could and should be amended by the BIA to provide for administration of business leases by the tribe. See Transcript of Tribal Court Proceedings in *Smith and Henkel* v. *Yavapai-Prescott Community* at 87–91. Notwithstanding the possible merits of this suggestion, the Board is bound by the regulations now in force.)

[3] This matter must necessarily be returned to the Phoenix Area Director for regular administration of the lease between the parties. The collateral attempt by the tribal court to cancel appellant's lease by entry of a declaratory judgment that appellant "materially breached the lease" [18] was ineffective in and of itself to result in cancellation since the judgment went beyond the subject matter jurisdiction of that court to enforce. Pursuant to 25 CFR 131.14, promulgated by the Secretary in response to 25 U.S.C. § 415 (1976), the Department is vested with final cancellation authority over business leases of trust land.[19] This holding is not a novel position for the Department, but rather follows past decisions of the Secretary concerning lease cancellations.[20]

Decision

The Aug. 30, 1979, determination by the Phoenix Area Director that the Yavapai-Prescott Tribe was authorized to cancel appellant's lease with the Yavapai-Prescott Tribe without the approval of the Secretary is set aside. This matter is remanded to the Area Director with instructions to administer the lease pursuant to the provisions of 25 CFR Part 131 and the lease agreement of Sept. 11, 1969.[21]

---

[17] 25 CFR 2.18, 2.19.

[18] Although there is much in the record concerning the handling of the subleases of the auto dealership (including the transcript of the tribal court proceedings), there is no description of any damage to the tribe caused by the two subleases made by appellant since 1969. The Area Director will need to consider whether there was in fact any breach in this case where it affirmatively appears the sublessees were acceptable to the tribe. He will also need to consider whether the subleases were commercially reasonable and in the best interest of the tribe.

[19] *See Bledsoe* v. *United States*, 349 F. 2d 605, 607 (10th Cir. 1965).

[20] Prior decisions of this Board, which are final for the Department, have recognized that leases of tribally owned trust land effectuated under provisions of 25 CFR Part 131 may not be cancelled without Departmental approval. *See Merrill Karlen* v. *Commissioner*, 6 IBIA 181 (1977); *Benjamin D. Vieau* v. *Commissioner*, 6 IBIA 150 (1977); *Alton K. Brown* v. *Albuquerque Area Director*, 5 IBIA 155 (1976). In a related subject area, it is recognized that cancellation of rights–of–way over tribally owned trust land requires Departmental action. *See* 25 CFR Part 161. This requirement is provided by regulation even though the governing statutes, 25 U.S.C. §§ 323–324 (1976), expressly address only the authority of the Secretary to grant such rights–of–way. *See Whatcom County Park Board* v. *Portland Area Director*, 6 IBIA 196, 84 I.D. 938 (1977); *Brown County, Wisconsin*, 2 IBIA 320 (1974).

[21] Although this entire matter appears to have been fully presented for decision, final acton by the Board is not possible since there has been no agency decision on the merits. While the decision reviewed (that the Area Director was without authority to act) is set aside, the question concerning the propriety of the lease cancellation remains yet to be decided. This is a matter for the agency to decide, subject to a further right of appeal to the Commissioner and the Board.

This decision is final for the Department.

Franklin Arness
Administrative Judge

We concur:

Wm. Philip Horton
Chief Administrative Judge

Mitchell J. Sabagh
Administrative Judge

DRUMMOND COAL CO.

2 IBSMA 96

Decided *June 3, 1980*

Petition for discretionary review by the Office of Surface Mining Reclamation and Enforcement from a November 7, 1979, decision by Administrative Law Judge David Torbett vacating Notice of Violation No. 78–II–17–15 (Docket No. NX 9–83–R).

Reversed.

1. Surface Mining Control and Reclamation Act of 1977: Tipples and Processing Plants: In Connection With—Surface Mining Control and Reclamation Act of 1977: Words and Phrases

"Surface coal mining operations." **Where a coal processing facility is ownd by the same company that owns all the mines that supply coal to it, that facility may conduct activities "in connection with" a surface coal mine within the meaning of "surface coal mining operations" in 30 CFR 700.5.**

2. Surface Mining Control and Reclamation Act of 1977: Tipples and Processing Plants: At or Near a Minesite—Surface Mining Control and Reclamation Act of 1977: Words and Phrases

"Surface coal mining operations." **Where a coal processing facility is functionally and economically integrated with several neighboring surface coal mines but is 9 miles distant from the closest of those mines, that facility may be "near" a minesite within the meaning of "surface coal mining operations" in 30 CFR 700.5.**

APPEARANCES: William B. Long, Esq., and Richard E. Dick, Esq., for Drummond Coal Company, Jasper, Tennessee; John P. Williams, Esq., Office of the Field Solicitor, Knoxville, Tennessee, and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

Factual and Procedural Background

On Dec. 8, 1978, the Office of Surface Mining Reclamation and Enforcement (OSM) inspected Drummond Coal Company's (Drummond) coal processing facility, known as the Sayre Processing Plant, in Jefferson County, Alabama, and issued Notice of Violation No. 78–II–17–15 pursuant to sec. 521(a)(3) of the Surface Mining Control and Reclamation Act of 1977.[1] The notice contained two violations, allegedly failing to pass all surface drainage from the processing plant through a sedimentation pond and allegedly discharging surface and ground water into underground mine workings, both in violation of 30 CFR 715.17.

---

[1] Act of Aug. 3, 1977, 91 Stat. 445, 505, 30 U.S.C. § 1271(a)(3) (Supp. I 1977).

On Dec. 27, 1978, Violation No. 2 was vacated by OSM. The next day Violation No. 1 was terminated. Subsequently, OSM issued a proposed assessment of a civil penalty. Pursuant to 30 CFR 723.17 Drummond requested a conference with OSM to review the assessment. On July 3, 1979, OSM notified Drummond that it was eliminating the civil penalty. The following week Drummond filed a "Petition or Application for Review." On July 31, 1979, OSM filed an answer and a motion to dismiss the "Petition or Application." As grounds for the motion, OSM stated that if the document filed by Drummond were considered an application for review it should be dismissed as not having been filed within 30 days of receipt of the notice, as required by 43 CFR 4.1162. OSM argued in the alternative that if the filing were considered to be a petition for review of a proposed assessment of a civil penalty, the petition should be dismissed because Drummond was not a "person charged with a civil penalty" pursuant to 43 CFR 4.1150.

At the hearing on Sept. 26, 1979, the Administrative Law Judge denied the motion to dismiss. He considered the document filed by Drummond to be a petition for review, that it was timely filed, and that Drummond had a right to file it, despite the fact that no penalty was assessed (Tr. 8). The hearing continued and at the conclusion of OSM's presentation of its case, Drummond moved to vacate the notice of violation because OSM had failed to show that Drummond's coal processing plant was subject to the Act and, therefore, OSM lacked jurisdiction over Drummond's facility. The Administrative Law Judge granted the motion and vacated the notice of violation. On Nov. 7, 1979, he issued a written confirmation of his oral decision.

OSM filed a document captioned "Notice of Appeal" with the Board on Dec. 7, 1979. OSM requested that if the Board determined that no right of appeal was available pursuant to 43 CFR 4.1271, the Board consider the filing to be a petition for discretionary review pursuant to 43 CFR 4.1270. The Board granted the petition on Dec. 28, 1979.

The following facts are undisputed by the parties. Drummond Coal Company owns and operates a coal processing facility known as the Sayre Processing Plant in Jefferson County, Alabama (Tr. 16; Exh. R-4). The activities conducted at the plant included the crushing, cleaning, loading, and processing of coal (Tr. 17-21; Exh. R-4).

All the coal processed at the plant is delivered to it from seven Drummond surface coal mines located 9 to 30 miles from the facility (Exh. R-4). Forty-five percent of the coal processed comes from two mines that are each 9 miles away. The plant is in the northwestern part of Jefferson County near the Jefferson-Walker County line (Tr. 36, 41), and the mines are in the three contiguous Alabama counties of Jefferson, Walker, and Cullman (Tr. 40-41). The trucks which deliver coal from the mines to the processing plants travel over public roads (Tr. 17-18, 39).

The parties agreed that in considering the appeal the Board could draw the following conclusions stated on page 2 of OSM's brief:

> (1) If Drummond's processing plant is found to fall under the definition of "surface coal mining operations" in 30 C.F.R. § 700.5, the violation [Violation No. 1] cited by OSM in Notice of Violation No. 78-II-17-15 did in fact exist on December 8, 1978.
>
> (2) Drummond's processing plant was subject to state regulation within the scope of the interim federal performance standards on December 8, 1978 (Ex. R-5-R-8). [Footnote omitted.]

Issue

Is Drummond's Sayre Processing Plant included under the definition of "surface coal mining operations" in 30 CFR 700.5?

Discussion

Activities encompassed by the definition of surface coal mining operations in 30 CFR 700.5 [2] are those "conducted on the surface of lands *in connection with a surface coal mine.*" (Italics added.) The definition also states that such activities include "the cleaning, concentrating, or other processing or preparation, loading of coal for interstate commerce *at or near the mine-site: * * *.*" (Italics added.) Therefore, for Drummond's coal processing plant to be considered a surface coal mining operation and subject to OSM's jurisdiction it must pass two tests. Its activities must be conducted in connection with a surface coal mine, and the plant must be located at or near the minesite.

[1] The facts in this case are different from those in *Western Engineering, Inc.*, 1 IBSMA 202, 204-205, 86 I.D. 336 (1979). Here the coal processing facility is owned by a company that supplies that facility from several mines owned by the same company. There may be other relationships that would suffice to establish a "connection" between an activity and a surface coal mine, but common ownership and use are an

---

[2] 30 CFR 700.5 reads in pertinent part: "*Surface coal mining operations* means—

"(a) *Activities conducted on the surface of*

(Continued)

(Continued)

lands in connection with a surface coal mine or, subject to the requirements of Section 516 of the Act, surface operations and surface impacts incident to an underground coal mine, the products of which enter commerce or the operations of which directly or indirectly affect interstate commerce. Such activities include excavation for the purpose of obtaining coal, including such common methods as contour, strip, auger, mountaintop removal, box cut, open pit, and area mining, the uses of explosives and blasting, and in situ distillation or retorting, leaching or other chemical or physical processing, and the cleaning, concentrating, or other procession or preparation, loading of coal for interstate commerce *at or near the mine-site.*" (Italics added.)

adequate basis for finding that an "[a]ctivit[y is] conducted * * * in connection with a surface coal mine."

[2] The next question is whether Drummond's crushing, cleaning, processing and loading activities occur "at or near" a minesite. Since they are not conducted "at" one of Drummond's mines, are they "near" one or more of them? As Black says, "The word ['near'] as applied to space is a relative term without positive or precise meaning, depending for its signification on the subject-matter in relation to which it is used and the circumstances under which it becomes necessary to apply it to surrounding objects." [3] In this case, Drummond's coal processing activities are functionally and economically integrated with the operation of several neighboring mines. It is true that distances of 9 to 30 miles separate the coal processing facility from these mines, but that circumstance alone should not be decisive in light of the context in which the activities at the facility are conducted. The fact of the facility's location in relation to Drummond's mines and the fact that these mines all use that facility outweigh the almost coincidental fact that the closest mine is 9 miles away. Under these circumstances Drummond's coal processing activities are conducted "near" its mines.

WILL A. IRWIN
Chief Administrative Judge

ADMINISTRATIVE JUDGE MIRKIN CONCURRING:

In view of the present departmental posture in regard to coal processing facilities, I question seriously whether any good purpose is now served by making the fine distinctions we declared we would make in our remand in *Ross Tipple Co.*, 1 IBSMA 303 (1979).[1] Nevertheless, until the Secretary amends the regulations, we are obligated to construe and apply the existing ones. Perhaps, by not endeavoring to compromise our views as we customarily do, but, instead, by attempting to set forth our separate rationales in this and the series of coal processing cases now pending, we may even prove of some assistance to the Secretary in the promulgation of any final regulation.

In *Western Engineering, Inc.*, *supra*, we had a company that operated a river terminal and acted as a contract handler of coal. Its plant was built originally to load dry bulk commodities onto river barges. It did not own, operate or lease any coal mines. We held that whatever it operated was not a surface coal mining operation as defined in 30 CFR 700.5.

---

[3] BLACK'S LAW DICTIONARY, at 927 (5th ed. 1979).

[1] On Mar. 31, 1980, the U.S. District Court for the District of Columbia approved a settlement agreement which, in part, states as follows: "13. Defendant agrees that within 60 days of the effective date of this agreement he will propose a rulemaking to clarify OSM's authority to regulate coal processing facilities during the interim program." The defendant in this case is the Secretary of the Interior. *Council of the Southern Mountains, Inc. v. Andrus*, Civ. No. 79–1521 (D.D.C. Mar. 31, 1980).

In the case before us we have a coal processing facility owned and operated by the same company which owns and operates seven surface coal mines located from 9 to 30 miles around the processing plant. The plant processes the coal from those mines and no others (Exh. R-4). The plant's activities are conducted "in connection with a surface coal mine" as set forth in 30 CFR 700.5. (Indeed, these activities are in connection with a series of them.) The only remaining question is whether the plant is also located "at or near the mine-site." It is not "at," which is a fairly definite term. "Near," though, is a relative word whose meaning will depend on the circumstances.[3] Here, we have a complex of mines whose focal point is a processing facility. There is a common owner and operator. Under the circumstances, I have no problem in determining that the processing plant's activities are conducted in connection with a surface coal mine and that it is near the minesite within the definition of 30 CFR 700.5.

MELVIN J. MIRKIN
Administrative Judge

ADMINISTRATIVE JUDGE FRISHBERG DISSENTING:

In *Western Engineering, Inc.*, 1 IBSMA 202, 86 I.D. 336 (1979), this Board analyzed the definition of "surface coal mining operations" and found that because of its "ambiguous quality" and the failure of the legislative history of the Act to clarify the ambiguities, those ambiguities should be resolved in favor of *Western*. The Board also indicated in footnote 10 of that decision in discussing the use of the term "coal processing" in the legislative history of the Act that the physical relationship of the processing plant and the supplying mine is an important consideration. *Id.* at 212, 86 I.D. 341. The footnote reads in pertinent part: "It does not, however, establish that coal processing which does not occur as part of the complex of activities which physically make up a particular coal mine site is governed by the performance provisions of the Act and interim regulations."

There has been no clarification of the definition of surface coal mining operations since the issuance of *Western*. The tests to determine whether a coal processing facility is a surface coal mining operation and, therefore, subject to OSM jurisdiction remain the same. The facility's activities must be conducted in connection with a surface coal mine, and the facility must be located at or near the minesite.

OSM suggests that the Board consider two factors in determining whether there is a "connection" between the activities conducted at the processing facility and those conducted at a surface coal mine. Those factors are: (1) the physical proximity between the processing facility and the mine or mines that supply coal to it; and (2) the extent of common ownership or control over the processing plant and the mine or mines that supply coal to it (OSM Brief at 5).

---

[3] *See, e.g., J. W. Kelly & Co. v. State*, 123 Tenn. 516, 132 S.W. 193, 201 (1910). Interestingly, this case also contains a definition of "tipple."

Even assuming that I could accept OSM's argument as the majority does, that common ownership is sufficient to satisfy the connection test, Drummond's facility is not located "at or near the mine-site."

OSM provides little guidance for determining the meaning of "at or near the mine-site" other than to assert that Drummond meets the test. It merely states that "[a]lthough none of Drummond's mines are adjacent to its processing plant, the plant is 'near' all the mines" (OSM Brief at 6). Taking the closest supplying mine to the facility in this case, I am unwilling to hold that a coal processing facility that is 9 miles from a supplying mine is at, or even near, such a mine-site.[1] While I realize the relative nature of the term "near" and that its meaning is dependent upon the circumstances of its use, a coal processing facility located 9 miles from a mine is not proximate to the mine, nor is it close-by, adjacent to, contiguous to, or abutting a mine. It is not "part of the complex of activities which physically make up [that] particular coal mine site." *Western Engineering, Inc., supra.*

Therefore, I would conclude that Drummond's coal processing plant in this case is not included in the definition of surface coal mining operations.

NEWTON FRISHBERG,
Administrative Judge.

ADMINISTRATIVE APPEAL OF FORT BERTHOLD LAND & LIVESTOCK ASS'N.

v.

AREA DIRECTOR, ABERDEEN AREA OFFICE, BUREAU OF INDIAN AFFAIRS

8 IBIA 90

Decided *June 6, 1980*

Appeal from decision of Area Director raising grazing fees.

Sustained in part; referred for hearing.

1. Indian Lands: Grazing: Generally—Indian Lands: Grazing: Rental Rates

The Bureau's decision to increase grazing fees for the fourth year of the permit period is not inconsistent with the general regulatory provisions of 25 CFR Part 151, which are incorporated by reference in the permit.

2. Indian Lands: Grazing: Generally—Indian Lands: Grazing: Rental Rates

The plain wording of the grazing permit does not convey the stipulation that new fees may be pronounced by Aug. 1, 1979, but not thereafter. As there is no legal requirement that permittees be given prior notice of grazing fee increases, it is not unreasonable to conclude that the Aug. 1 date cited in the permit refers merely to a goal or objective for the completion of fee reevaluations.

---

[1] "Near" is defined in *Black's Law Dictionary*, at 927 (5th ed. 1979) as:

"Proximate; close-by; about; adjacent; contiguous; abutting. The word as applied to space is a relative term without positive or precise meaning, depending for its signification on the subject-matter in relation to which it is used and the circumstances under which it becomes necessary to apply it to surrounding objects. * * * Not far distant in time, place or degree; not remote; adjoining."

3. Indian Lands: Grazing: Generally—Indian Lands: Grazing: Appeals—Indian Lands: Grazing: Rental Rates

The appellant association and members thereof have not been denied *substantive* due process through the readjustment of a grazing permit which specifically provides for readjustment. Appellant's *procedural* due process rights are secured through the opportunity to appeal the Area Director's action to the Commissioner and the Board of Indian Appeals pursuant to the provisions of 25 CFR Part 2 and 43 CFR 4.350–4.369.

APPEARANCES: Jon R. Keriam, Esq., Minot, North Dakota, for appellant; Wallace G. Dunker, Esq., Office of the Field Solicitor, Aberdeen, South Dakota, for respondent; Austin H. Gillette for the Three Affiliated Tribes, Fort Berthold Reservation.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

INTERIOR BOARD OF INDIAN APPEALS

Appellant in this case is the Fort Berthold Land and Livestock Association, a nonprofit corporation chartered by the Secretary of the Interior as an Indian Association. The Association, composed primarily of Indian ranchers, has appealed from an action of the Aberdeen Area Director, Bureau of Indian Affairs, dated Oct. 4, 1979, raising the minimum acceptable grazing rental rate on the Fort Berthold Indian Reservation.

Appeal of the Area Director's action was before the Commissioner of Indian Affairs until Feb. 1, 1980. On that date, the Commissioner referred the matter to the Board of Indian Appeals for review and final decision pursuant to the provisions of 25 CFR 2.19(b).[1] By order dated Feb. 13, 1980, the Board referred the appeal to the Hearings Division of the Office of Hearings and Appeals for a fact-finding hearing and recommended decision by an Administrative Law Judge in accordance with the provisions of 43 CFR 4.361–4.367.

On Apr. 11, 1980, Administrative Law Judge Keith L. Burrowes filed a recommended decision with the Board. Based on his review of the administrative record, Judge Burrowes concluded that the respondent Bureau could not as a matter of law increase rental rates for the final year of the grazing permit period. Accordingly, no evidentiary hearing was conducted. Pursuant to 43 CFR 4.368, interested parties were afforded an opportunity by the Board to submit exceptions to the recommended decision. Formal exceptions were filed by the Aberdeen Field Solicitor on behalf of the Area Director on Apr. 28, 1980. A letter addressed to the Chief Administrative Law Judge of the Hearings Division from the Tribal Chairman of the

---

[1] Paragraph (b) of sec. 2.19 must be read in conjunction with paragraph (a). Together, they provide as follows:

"(a) Within 30 days after all time for pleadings (including extension granted) has expired, the Commission of Indian Affairs shall:

"(1) Render a written decision on the appeal or

"(2) Refer the appeal to the Board of Indian Appeals for decision.

"(b) If no action is taken by the Commissioner within the 30-day time limit, the Board of Indian Appeals shall review and render the final decision."

Three Affiliated Tribes, dated Apr. 14, 1980, has also been received by the Board as an exception to the recommended decision.

The Board has completed a review of the administrative record, the recommended decision and exceptions thereto, and the memorandum and order entered by the United States District Court for the District of North Dakota on Mar. 31, 1980, in *Danks* v. *Fields* (Civ. No. A4–80–39), an action for declaratory and injunctive relief brought by individual grazing permittees and the Fort Berthold Land and Livestock Association involving, among other things, the subject matter of this appeal. Contrary to the recommended ruling of Judge Burrowes, it is the consensus of the Board that the Area Director was authorized to increase the grazing fees for the permit year commencing Nov. 1, 1979. Based on the record as constituted, the Board remains unable to pass judgment on the reasonableness of the new rate and this issue shall again be referred to the Hearings Division with a request for an expedited fact-finding hearing and recommended decision thereon.

Authority to Adjust Rental Rate

The general authority of the Secretary of the Interior to protect and manage individually owned and tribal trust lands through the regulation of grazing on such lands is summarized at 25 CFR 151.2. Among other Acts, the general grazing regulations set forth in 25 CFR Part 151 were promulgated in response to Federal statutes codified at 25 U.S.C. §§ 393, 397, 403 and 466 (1976). Appellant does not challenge the validity of any of the foregoing laws in this appeal; instead, it is alleged on numerous grounds that the action of the Area Director in raising the rental rate at issue exceeded the limits of his authority as prescribed by contract and regulation.

The factual background necessary to an understanding of appellant's case is summarized in the court's order in *Danks* v. *Fields*, *supra*, as follows:

> In 1976 the Bureau of Indian Affairs (BIA), was preparing to grant permits to graze on Fort Berthold range units. The tribe, on June 10 and 11, 1976, and acting within the framework of the general grazing regulations, passed Range Resolution 76–173 (Exhibit 7), in conformance with 25 CFR 151.2, 3 and 4. The Area Director at Aberdeen, South Dakota, reviewed the resolution, expanded it to include necessary and advisable elements, and returned it as a proposed final resolution to the tribe.
>
> As explained in the redrawn resolution and the covering letter, the Area Director was concerned that the grazing fees of $27.00 for tribal land, and $36.00 for individual land, were too low. But, under 25 CFR 151.13, he accepted the tribal fee as to its lands, and under 25 CFR 151.13 (6) [[2]] he set the minimum fee for lands under his jurisdiction at $42.00 per animal unit per year.
>
> The original tribal resolution had provided:
>
> "That grazing permits shall be issued for four (4) years contract period beginning November 1, 1976, and terminate

---

[2] So in original. Should probably read "25 CFR 151.13(b)."

> October 31, 1980, with a re-evaluation period after three (3) years."
>
> The Area Director changed that provision to read:
>
> "That grazing permits shall be issued for a four (4) year contract period beginning November 1, 1976, and terminating October 31, 1980. Grazing fees shall be re-evaluated in accordance with 25 CFR by Augst [*sic*] 1, prior to the beginning of the fourth year and such rate shall prevail for the balance of the permit period."
>
> He explained that the proposed four year permits should be re-evaluated after three years only as to the fee.
>
> * * * * *
>
> In 1979, the BIA had an independent evaluater [*sic*] review the grazing land and the market. Based on the evaluation on October 3, 1979, and pursuant to the grazing permit requirements, both the BIA and the Three Affiliated Tribes, established [*sic*] for the fourth year of the permit an "animal unit year" fee at $57.00. In a letter dated October 3, 1979, the permittees were informed that they would be billed on the new fee basis and were expected to pay the fee by November 1, 1979, the beginning of the last year of the permit.

Slip Op. at 5–7.

Certain of appellant's grounds for reversal set forth in its notice of appeal have been dismissed by the court in the above-cited opinion. For example, appellant alleges that the Area Director had no authority to alter the permit terms agreed upon by the Three Affiliated Tribes in Resolution No. 76–173 and secondly, that the Area Director could not in any event adjust grazing fees on permits under less than 5 years' duration. In addressing the Area Directors' modification of the permit terms contained in Resolution No. 76–173, the court states in *Danks* v. *Fields*: "Plantiffs maintain that the change above quoted was done in violation of 25 CFR 151.13(a) and 151.14. I disagree. I find the changes were consistent with the regulations, and were in fact beneficial to the permittees, limiting as it did, the scope of permissible re-evaluation." Slip Op. at 6.

Noting that grazing permits as defined by 25 CFR 151.1(k), are a revocable privilege, the court declined to adopt appellant's plaintiffs' position that range permits are complete contracts, fixing, for the duration of the permits, all of the relationships of the parties. *Ibid.*

Based on the foregoing, it appears that appellant is left with a single unresolved challenge to the authority of the Bureau to increase grazing fees on the Fort Berthold Reservation for the 1979–1980 season, viz., that under the purported terms of the approved permit no increase could be decreed after Aug. 1, 1979. This is the position which Judge Burrowes adopts in his recommended decision to the Board.

The provision in controversy is stated in the permits issued in 1976 as follows: "Grazing fees shall be re-evaluated in accordance with 25 CFR by August 1, prior to the beginning of the fourth year and such rate shall prevail for the balance of the permit period."

[1] Appellant is correct in stating that the only specific regulation found in 25 CFR concerning the adjustment of grazing fees is sec.

151.14(c), which pertains to permits for a period in excess of 5 years.[3] (As previously noted, however, the court in *Danks* v. *Fields* was not persuaded that a regulatory scheme which requires 5-year permits to provide for fee adjustments at the expiration of the permit period, could not be interpreted to preclude fee adjustments for permits of lesser duration).

In the absence in the regulations of specific reevaluation or adjustment provisions for 4-year permits, it is reasonable to conclude that the phrase "shall be re-evaluated in accordance with 25 CFR" as found in the subject permits, refers to the general statements of the Secretary's authority and goals as contained in 25 CFR 151.2 and 151.3. As pertinent to the matter of fee adjustment, the foregoing general regulations require the Secretary "to improve the economic well being of the Indian people" and to administer grazing privileges "in a manner which will yield the highest return consistent with sustained yield land management principles and the fulfillment of the rights and objectives of tribal governing bodies and individual land owners." Without addressing the reasonableness of the specific rate increase effected by the Bureau in this case, we hold that the Bureau's decision to increase grazing fees for the fourth year of the permit period is not inconsistent with the general regulatory provisions of 25 CFR Part 151, which are incorporated by reference in the 1976 permits.

[2] With respect to the permit provision that fees shall be re-evaluated *by August 1*,[4] we do not agree that this language precludes the Bureau from setting new fees after August 1. In the first place, in our opinion the plain wording of the permit does not convey the stipulation that new fees may be pronounced by Aug. 1, 1979, but not thereafter. Further, since there is no legal requirement that permittees be given prior notice of grazing fee increases,[5] it is not unreasonable to conclude that the August 1 date cited in the permit refers merely to a goal or objective for the completion of fee reevaluations.

While we have found no related Indian grazing cases, the Board of Land Appeals has held that it was not improper for the Bureau of Land Management to readjust a coal lease issued pursuant to the Mineral Leasing Act, Feb. 25, 1920, 41 Stat. 439, *as amended*, 30 U.S.C. § 207 (1976), "within a reasonable time" after expiration of the initial lease period, with or without notice by the Bureau to the lessee prior to the anniversary date of the lease, and notwithstanding the fact that the statute specifically authorizes the readjustment of lease terms "at the end of" each lease period. *California Portland Cement Co.*, 40 IBLA 339 (1979), *appeal pending sub nom., Rosebud* v. *Andrus*, Civ. No. 79–160 (D. Wyo., filed June 6, 1979). Among other things, the Board of Land Appeals noted that appellants' argument that readjustment could not be made after the technical expiration of the lease period "ignores the difficulties attendant upon readjustment and the realities of the coal industry during the period prior to the lease anniversary dates in 1975." 40 IBLA 345. The Board went on to hold that appellants' rights to substantive due process were not violated by the readjustment of a lease which specifically provides for readjustment. 40 IBLA 347. With respect to procedural due process, the Board noted that existing procedures allow objections to be filed to readjustment determinations, including a right of appeal to the Board. *Ibid.*

---

[3] This regulation provides:

"(c) Permits for a period in excess of 5 years shall provide for review of the grazing fees by the Superintendent at the end of the first 5 years and for adjustment as necessary."

[4] It is acknowledged by all parties that the complete date referred to is Aug. 1, 1979.

[5] Appellant asserts that prior notice is a contractual right of the members of the Association. First Notice of Appeal dated Nov. 5, 1979, at 4. We disagree. The permits granting grazing privileges to members of the Association contain no mention of notice. Neither do the applicable statutes, regulations or BIA manual provisions (55 BIAM Supp. I).

Similarly, in the case at hand we find that the appellant Association and the members thereof have not been denied *substantive* due process through the readjustment of a grazing permit which specifically provides for readjustment. Moreover, unlike *California Portland Cement Co., supra*, the readjustment before us was pronounced *prior* to the expiration of the lease period. In addition, appellant's *procedural* due process rights are secured through the opportunity to appeal the Area Director's decision to the Commissioner and this Board pursuant to the provisions of 25 CFR Part 2 and 43 CFR 4.350–4.369.[9]

Reasonableness of Rental Rate Increase

Appellant alternatively alleges in this case that "the data upon which the Agency based its re-evaluation of the grazing fees constitutes an invalid and inadequate data base." Second Notice of Appeal, dated Nov. 5, 1979, at 4. In support of this allegation, appellant refers to numerous alleged shortcomings and inaccuracies in the independent appraisal furnished the Bureau in September 1979. Based on the record as constituted, it is not possible for the Board to evaluate the merits of appellant's contention. While we do not believe that permittees are entitled to a formal evidentiary hearing whenever a rental adjustment is proposed by the Bureau, under the circumstances of this case an evidentiary hearing seems necessary and appropriate.

This matter shall therefore be referred to the Hearings Division for reassignment to an Administrative Law Judge to conduct a hearing and render a recommended decision to the Board on the reasonableness of the grazing fee increase at issue. Expedited consideration will be requested in light of the important interests at stake and in view of the court's conclusion in *Danks* v. *Fields* that Indian ranchers and Indian landowners are being harmed by the continuing failure of the Department to resolve this controversy.

---

[9] The Field Solicitor's contention that the subject matter of this case is not appealable under 25 CFR Part 2 is without merit. The provisions of 25 CFR Part 2 apply to requested correction of actions by BIA officials where the matter is protested as a violation of a right or privilege of the appellant. 25 CFR 2.2. *See also*, 43 CFR 4.351. Allegations that an increase in grazing fees were unauthorized and in the alternative, not based on valid data or considerations, present issues cognizable under the appeal provisions of 25 CFR Part 2.

ORDER

Appellant's request that the Aberdeen Area Director's decision of Oct. 4, 1979, raising the grazing fees on the Fort Berthold Indian Reservation, be reversed as a matter of law is denied. This case is referred to the Hearings Division pursuant to 43 CFR 4.361(a) for an evidentiary hearing and recommended decision by an Administrative Law Judge on the sole issue of the reasonableness of the fees set by the Area Director. By this order, it is requested that the Hearings Division provide expedited consideration of this case.

WM. PHILIP HORTON
Chief Administrative Judge

WE CONCUR:

FRANKLIN ARNESS
Administrative Judge

MITCHELL J. SABAGH
Administrative Judge

BLACK FOX MINING & DEVELOPMENT CORP.

2 IBSMA 110

Decided *June 6, 1980*

Appeal by Black Fox Mining & Development Corp. from that part of a Jan. 28, 1980, decision by Administrative Law Judge Sheldon L. Shepherd upholding a violation of 30 CFR 715.17(a) described in Notice of Violation No. 79-I-54-14 (Docket No. CH 9-172-R).

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Hydrologic System Protection: Generally—Surface Mining Control and Reclamation Act of 1977: Water Quality Standards and Effluent Limitations: Sedimentation Ponds

The sedimentation pond requirement of 30 CFR 715.17(a) is a preventive measure and proof of the occurrence of the harm it is intended to prevent is not necessary to establish a violation of that requirement.

2. Surface Mining Control and Reclamation Act of 1977: Variances and Exemptions: Generally

Evidence concerning an alternative method of silt control does not show compliance with the sedimentation pond requirement of 30 CFR 715.17(a); such evidence may be presented to the regulatory authority which may grant exemptions to that requirement.

APPEARANCES: Leo M. Stepanian, Esq., Brydon, Stepanian & Muscatello, Butler, Pennsylvania, for Black Fox

Mining & Development Corp.; Billy Jack Gregg, Esq., Office of the Field Solicitor, Charleston, West Virginia, and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Division of Surface Mining, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

Black Fox Mining & Development Corp. (Black Fox) has appealed from that part of a Jan. 28, 1980, decision by Administrative Law Judge Sheldon L. Shepherd upholding Violation No. 1 of Notice of Violation No. 79–I–54–14. Violation No. 1 concerned an alleged failure to pass all surface drainage from disturbed areas through a sedimentation pond or series of ponds before allowing it to leave the permit area in violation of 30 CFR 715.17(a). For the reasons stated below, the decision appealed from is affirmed.

Procedural Background

On July 24, 1979, pursuant to the Surface Mining Control and Reclamation Act of 1977 (Act)[1] inspectors from the Office of Surface Mining Reclamation and Enforcement (OSM) visited a surface coal mining operation in Butler County, Pennsylvania. The inspectors issued Notice of Violation No. 79–I–54–14 containing two alleged violations to Black Fox, the permittee. On Aug. 2, 1979, Black Fox sought review of the violations. A hearing was held and in the Jan. 28, 1980, decision is was concluded that Violation Nos. 1 and 2 of the notice were properly issued.[2] Black Fox filed a timely notice of appeal and both parties filed briefs.

Discussion

The evidence produced at the hearing established a prima facie case that appellant violated 30 CFR 715.17(a).[3] Sedimentation ponds and diversion ditches had been constructed on the southeastern portion of the permit area (Tr. 9; Exh. R–8). On the date of the inspection one of the ditches leading to a pond had been breached, and there was evidence that surface drainage had run in the ditch toward the breach (Tr. 6). Another ditch did not lead to a pond, but emptied into a grassy area off the disturbed area (Tr. 6–7). The ditch received surface drainage from approximately 3 acres of disturbed area. There was evidence that sediment had washed into that ditch—"a fan-type delta of clay material—what appeared to be clay material" (Tr. 13–14). Approximately 300 feet to the east of the diversion ditches in question there was a stream (Exh. R–8).

---

[1] Act of Aug. 3, 1977, 91 Stat. 445, 30 U.S.C. §§ 1201–1328 (Supp. I 1977).

[2] While the decision below concluded that Violation Nos. 1 and 2 were properly issued, there was apparently no reason to rule on Violation No. 2. That violation was admitted by Black Fox, and the application for review, as it related to that violation, was withdrawn with prejudice at the hearing (Tr. 3; Decision at 1).

[3] 43 CFR 4.1171 states:

"(a) In review of section 521 notices of violation * * *, OSM shall have the burden of going forward to establish a prima facie case as to the validity of the notice, * * *.

"(b) The ultimate burden of persuasion shall rest with the applicant for review."

Appellant admitted that the diversion ditches were located to intercept surface drainage as it moved downhill toward the stream (Tr. 33); that surface drainage in those ditches would exit at the breach before reaching a sedimentation pond or would drain into the grassy area without passing through a pond (Tr. 33–34); and that such drainage would not pass through any sedimentation ponds before leaving the permit area or before entering the stream (Tr. 34).

Appellant failed to rebut OSM's prima facie case. Appellant's principal argument was that OSM did not show that surface drainage left the permit area. To the contrary, the evidence clearly established that surface drainage traveled in the diversion ditches; that such drainage would not pass through sedimentation ponds before reaching the stream; and that because of the downhill location of the stream, surface drainage would necessarily flow toward the stream which was off the permit area.

[1] Appellant's evidence apparently was directed at proving that no sedimentation from the permit area reached the stream. While appellant faults OSM for failing to provide evidence of sediment reaching the stream, it is mistaken concerning the type of evidence necessary to establish the violation cited by OSM. In *Island Creek Coal Co.*, 1 IBSMA 285, 290, 86 I.D. 623, 626 (1979), we held with respect to the haul road maintenance requirements of 30 CFR 717.17(j) that OSM did not need to provide evidence of suspended solids entering a stream in order to establish a violation of those maintenance requirements designed to prevent disturbance of the hydrologic balance. Similarly, the sedimentation pond requirement of 30 CFR 715.17(a) is a preventive measure and proof of the occurrence of the harm it is intended to prevent is not necessary to establish a violation of that requirement. Even assuming appellant could prove that no silt reached the stream, that would not necessarily show that no surface drainage left the permit area nor would it be sufficient to rebut OSM's prima facie case.

[2] Furthermore, appellant's evidence concerning natural vegetation as an alternative method for silt control did not show compliance with 30 CFR 715.17(a). While that regulation provides that the regulatory authority may grant exemptions from the sedimentation pond requirement, there is no evidence in the record that appellant ever sought an exemption. *See White Winter Coals, Inc.*, 1 IBSMA 305, 314–315, 86 I.D. 675, 679 (1979); *aff'd mem.*, *White Winter Coals, Inc.* v. *Andrus*, No. 3–80–3 (E.D. Tenn. Apr. 13, 1980).

Appellant also argues that is cannot be charged with a violation of 30 CFR 715.17(a) because OSM failed to designate an inconsistent

Pennsylvania law as required by sec. 505 of the Act.[4] The Pennsylvania law referred to by appellant[5] provides that mining permits will not be approved without a practicable method for preventing siltation or other stream pollution. Appellant asserts that since a mining permit was issued, it was in compliance with Pennsylvania law concerning surface water drainage.

Permit approval does not guarantee day to day compliance with the law. The cited regulation, 30 CFR 715.17(a), requires that surface drainage be passed through sedimentation ponds. Appellant's permit requirements were apparently in accord with this requirement in that appellant had installed sedimentation ponds on the permit area. In fact drainage in one of the diversion ditches in question would have passed through a pond but for the breach that occurred. The record fails to disclose that the sedimentation pond requirement of 30 CFR 715.17(a) was in any way inconsistent with the sedimentation control measures approved by the State for this permit.

That part of the decision appealed from is affirmed.

MELVIN J. MIRKIN
Administrative Judge

NEWTON FRISHBERG
Administrative Judge

WILL A. IRWIN
Chief Administrative Judge

APPEAL OF TIFFANY CONSTRUCTION CO.

IBCA-1162-8-77

Decided *June 12, 1980*

Contract No. N00-C-1420-6280, Bureau of Indian Affairs.

Sustained in part.

1. Contracts: Disputes and Remedies: Equitable Adjustments

Where the evidence of record is too general and inconclusive to permit a precise mathematical computation of quantum, but preponderates in favor of the contractor for entitlement to some allowance for unpaid excavation resulting from performance of a fixed price highway construction contract, the Board will determine the equitable adjustment by utilization of the jury verdict approach.

2. Contracts: Disputes and Remedies: Equitable Adjustments

In the absence of a statute, procurement regulation, or specific contract

---

[4] Sec. 505 (30 U.S.C. § 1255 (Supp. I 1977)) reads in relevant part:

"(a) No State law or regulation in effect on the date of enactment of this Act, or which may become effective thereafter, shall be superseded by any provision of this Act or any regulation issued pursuant thereto, except insofar as such State law or regulation is inconsistent with the provisions of this Act.

"(b) * * * The Secretary shall set forth any State law or regulation which is construed to be inconsistent with this Act."

[5] Appellant cites the law on page 6 of its brief as follows:

"*The Pennsylvania Surface Mining Conservation and Reclamation Act*, Act of Nov. 30, 1971, P.L. 554, 52 P.S. 1396.4(a)(2)(K) states:

". . . No approval (of the mining permit) shall be granted unless the plan provides for a practicable method of avoiding acid mine drainage and preventing avoidable siltation or other stream pollution. Failure to prevent water from draining into or accumulating in the pit, or to prevent stream pollution during surface mining or thereafter, shall render the operator liable to the sanctions and penalties provided in this act and is [*sic*] 'The Clean Streams Law,' and shall be cause for revocation of any approval, license or permit issued by the department to the operator."

provision permitting recovery from the Government for the costs of professional services not contributing directly to the performance of a fixed price type contract, such costs will not be allowed as part of an equitable adjustment, whether incurred before or after the findings of fact and decision of the contracting officer.

APPEARANCES: Mr. James P. Cunningham, Attorney at Law, Cunningham, Goodson & Tiffany, Ltd., Phoenix, Arizona, for Appellant; Mr. William D. Back, Department Counsel, Window Rock, Arizona, for the Government.

OPINION BY ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF CONTRACT APPEALS

Background

Tiffany Construction Co. (Tiffany, sometimes, appellant and sometimes, contractor) entered into contract No. NOO-C-1420-6280 with the Bureau of Indian Affairs (BIA), Department of the Interior on Oct. 4, 1974, for the construction of approximately 20 miles of highway grade and drain on the Navaya Indian Reservation, San Juan County, New Mexico. The work was substantially and satisfactorily completed on Nov. 4, 1975, well within the prescribed period of performance, including extensions, and there is no issue involved regarding the standard of performance by the contractor (AX-1).[1]

However, two principal disputes arose between the contracting parties. The first pertains to the correct final quantity measurement in cubic yards of the actual excavations performed by Tiffany. The second is whether Tiffany is entitled to certain extraordinary expenses incurred by it in the course of uncovering errors in the Government's earthwork calculations prior to the findings of fact and decision rendered by the Contracting Officer (CO).

The contract documents provided for three items of excavation: Item No. 203(3), Unclassified Excavation, at the unit price of $1.10 per cubic yard; Item No. 203(6), Borrow Excavation, at the unit price of $1.20 per cubic yard; and Item No. 203(6a), Borrow Excavation, at the unit price of $2.05 per cubic yard.[2] The total original contract price was $1,681,740, but by the time the 18th and final Modification Order No. 18, dated Apr. 21, 1977, had been issued, the total contract price had increased to $2,022,124.85.

---

[1] References to the record throughout this opinion will be abbreviated typically as follows: Appeal file, Exhibit 24—(AF-24);
(Continued)

(Continued)
Appellant's Exhibit 1—(AX-1); Government's Exhibit A—(GX-A); and Transcript, page 39—(Tr. 39). (AX-1) was a letter dated Dec. 19, 1975, signed by the Contracting Officer and addressed to Tiffany acknowledging final completion and acceptance as of Nov. 4, 1975, within the completion date of Nov. 28, 1975, and that no liquidated damages were involved.

[2] Normally, for construction of the kind involved here, material is taken from excavated areas for building the roadbed embankments and additional material, if necessary, from areas designated as borrow pits. The planned quantities, set forth in the contract, for the disputed items were as follows: Item 208(3), 696,040 cubic yards; Item 203(6), 87,730 cubic yards; and Item 203(6a), 102,178 cubic yards (AF-4).

Within the first 2 months of the contract work, Tiffany requested that it be allowed to obtain additional material by widening the ditches in certain areas rather than by excavating from the borrow pits. The request was made ostensibly for the benefit of both parties: The Government would save $0.10 per cubic yard and Tiffany would have a shorter haul (Tr. 151). By letter dated Dec. 10, 1974, Mr. Darrell Statham, Project Officer for the Government and also the Contracting Officer's representative (COR), after consultation with other engineers, agreed to the request for ditch widening "at suitable locations," but specified that the price would be at the Unclassified Excavation rate of $1.10 per cubic yard rather than the Borrow Excavation rate of $1.20 per cubic yard (AX-2).

Both Mr. Statham and Mr. Herb Tiffany, President of the appellant company, believed at that time that if the ditches were widened in certain areas, the excavation in those areas would probably exceed the planned quantity of excavation (Tr. 35, 156). Mr. Statham also testified that he recollected little, if any, unauthorized wasting; that there were about three areas where wasting was permitted by the Government inspectors; and that he had no recollection of excessive wasting by the contractor (Tr. 43, 44).

During construction the amount of daily excavation was measured by truckload count, but this method of measurement was used only as a "rule of thumb" measurement to aid in expediting progress payments to the contractor. Final payment was to be based on final surveys determining the actual as-built quantity of excavation (Tr. 45, 46).

A month or two before the substantial completion of the work, BIA's survey crews had started the necessary work to make the quantity determinations regarding the volume of excavations performed by the contractor. Mr. Tiffany was led to believe by BIA contract administrative officials that the settlement figures would be available by Nov. 15, 1975. However, after several postponements he was informed by the COR in January 1976 that there had been computer errors in the determinations and that the Government was having difficulties in coming up with final figures (Tr. 57–58, 157–161). Having received no indication from the Government by February 1976, Tiffany filed a court action seeking a writ of mandamus to compel the Government to determine final earthwork quantities and make payment accordingly. The suit was withdrawn after a meeting was held, certain matters resolved, and the contractor furnished cross-section earthwork computations, drawings, and data then available.[2]

When it became apparent to Tiffany that there was major disagreement with the Government's figures on quantity determinations of excavation, a registered civil engineer, Mr. Jeff D. Hardin, was hired to help resolve the disagreement. He accompanied Mr. Tiffany at a meeting held with BIA officials at Gallup, New Mexico, on Mar. 25, 1976, at which time the BIA issued modification No. 16 which stated the final quantities of excavation to be as follows: Item 203(3), 676,604 cubic yards; Item 203(6), 95,764.15 cubic yards; and Item 203(6a), 85,394.33 cubic yards. When these figures were compared to the planned quantities (n.2) a minus quantity for total excavation resulted. This meant that the Government, having paid on a planned quantity basis, would be seeking refunds from appellant because of overpayment.

---

[2] Undated memo from the Contracting Officer to the Field Solicitor transmitting appeal file.

Tiffany insisted that the Government's figures were incorrect, since throughout the contract period estimated quantities (load count) for Unclassified Excavation (Item 203 (3)) were running well over the planned quantities. For example, according to the Government's Daily Construction Report (AX-6), that item, on July 25, 1975, was 843,202 cubic yards. Thereupon, Tiffany employed legal counsel and professional surveyors under the supervision of Mr. Hardin, to conduct the necessary surveys and make calculations to arrive at an independent determination of the disputed quantities.

As a result, another meeting was held with BIA officials on Apr. 28, 1976, to discuss the substantial quantity differences between the parties regarding earthwork and excavations. Tiffany personnel pointed out that by a random survey of 95 out of an approximate total of 1,000 stations, or about 10 percent of the total project, about 23,900 cubic yards had not been computed by the Government. They took the further position that their preliminary estimates would probably be borne out if a complete survey was conducted and that they wanted payment. Significantly, at this meeting the COR, Mr. Statham, revealed that the computer had not been programmed for the Mar. 11, 1976, computer run on an "as-built" measurement, but rather on the basis of design slopes. It was further indicated by Government personnel that a new computer run, based on actual quantities would be necessary (AF-11).

After the meeting of Apr. 28, 1976, considerable correspondence and negotiations ensued between the parties for several months, with little progress toward a final settlement. Some agreement was reached, however, as reflected in Modification No. 17, dated Oct. 20, 1976 (AF-3), but this modification was accepted by the contractor with the understanding that its right to assert claims for certain items still remaining in dispute was reserved (AF-15). By letter of Dec. 13, 1976, Tiffany requested the Contracting Officer to deny its claims for unclassified excavation, borrow, an extraordinary expense so that its appeal could be perfected (AF-16). In response, on Jan. 21, 1977, the Contracting Officer, by letter, informed Tiffany of the Government's calculations of earthwork quantities. They were listed as follows: Item No. 203(3), Unclassified Excavation—planned quantity 696,040 cubic yards, as-built quantity 731,997 cubic yards; Item No. 203(6), Borrow Excavation—planned quantity 87,730 cubic yards, as-built quantity 95,540 cubic yards; Item 203(6a), Borrow Excavation—planned quantity 102,178 cubic yards, as-built quantity 85,394.33 cubic yards. The letter summarized the dollar calculations showing a net increase of $14,518.18 which was offered to Tiffany, but denied Tiffany's claim for extraordinary expenses incurred for establishing its claims (AF-36).

Although the latter document was not entitled "Findings of Fact and Decision of the Contracting Officer," it was treated as such by the parties. On Feb. 2, 1977, Tiffany filed its notice of appeal with the Contracting Officer for forwarding to this Board, but apparently, because of the extensive further correspondence between the parties after that time in an effort to settle their remaining differences, the notice of appeal was not forwarded to the Board until Aug. 17, 1977 (AF-40). In its notice of appeal (AF-8), appellant made the following claims:

1. For Unclassified Excavation, Item 203(3)—as-built in excess of 776,346 cubic yards, instead of 731,997 cubic yards as determined by the Government, at $1.10 per cubic yard, or $88,338.60.

2. For Borrow Excavation, Item 203(6)—as-built 97,830 cubic yards instead of 95,540 cubic yards at $1.20 per cubic yard or $14,112, alleging that it was paid for only 85,970 cubic yards.

3. For Borrow Excavation, Item 203(6a)—as-built 87,648 cubic yards as opposed to the Government's figure of 97,069 cubic yards for which, at $2.05 per cubic yard it was overpaid $19,313.05 and that both the Government's planned quantity and as-built quantity figures for this item were incorrect. (The total net claim for excavation after allowing for appropriate debits and credits was $83,137.55.)

4. For Extraordinary Expenses incurred, in order that portions of the contract could be clarified, change orders recognized and all claims except excavation and extraordinary expenses resolved, itemized as follows:

Attorneys fees	$4, 500. 00
Consulting Engineer fees	8, 318. 00
Professional Surveyors fees	5, 439. 60
Travel Expenses	502. 00
Total	18, 759. 60

5. For Interest on $83,135.55 at the legal rate from Jan. 1, 1976, representing approximately 60 days following acceptance of the contract.

The notice of appeal was allowed by the Board to be treated as appellant's complaint. By way of answer, the Government denied that its final figures were erroneous, averred that (i) appellant was finally paid for all items to which it was entitled by virtue of Modification No. 18, dated Apr. 21, 1977, and (ii) that the claimed extraordinary expenses were unallowable under applicable statutes and regulations, and requested that Tiffany take nothing by its appeal.

Discussion

At the outset of the evidentiary hearing the parties stipulated that the final quantities determined by the BIA are reflected in Modification No. 18 (AF-4), and that the net increase shown of $14,518 was paid by BIA to the contractor. Modification No. 18 shows the net increase of $14,518 to be based on as-built quantities of 731,997 cubic yards at $1.10 or a plus $39,552 for Item 203(3); 95,540 cubic yards at $1.20 or a plus $9,372 for Item 203(6); and 85,394.33 cubic yards at $2.05 or a minus $34,406 for Item 203(6a). Appellant's counsel then purported to amend the complaint in the following respects: On claim one from $88,338.60 to $48,783 and on Claim two from $14,112 to $2,748 (Tr. 5 and 6). Other amendments were held in abeyance until the conclusion of the hearing (Tr. 6), but were, in fact, not mentioned again at the conclusion of the hearing, or at any other time. We observe that appellant's claims varied substantially from time to time throughout this proceeding. In the notice of appeal (complaint) Tiffany claimed $83,137 for unpaid excavation and $18,759 for extraordinary expenses for a total claim of $101,897. As amended, its complaint resulted in a reduction of $50,978 to a net total of $50,919 claimed. However, in its posthearing brief, Tiffany's claim totaled $71,725.10 with a change in the claim for extraordinary expenses from $18,759 to $17,857.

In addition to our foregoing references to the evidence, we find the following items to be particularly significant:

1. Even though the COR, Mr. Statham, who probably observed firsthand the project construction more frequently and in greater detail than any other BIA employee, testified that he had no recollection of excessive unauthorized wasting by the contractor (Tr. 43, 44), the Government, nevertheless, charged Tiffany with 7,290 cubic yards at $1.10 for excess excavation and waste (AF-27).

2. The Government never presented in this record any explanation, satisfactory to the Board, for the dramatic differences of computation for unclassified excavation, Item 203(3), as between the final computer determination and the final load count determination. The final load count, upon which interim payments to the contractor were to be based, was shown in the Government's Daily Construction Report of July 25, 1975 (AX-6), to be 843,202 cubic yards, while the final computer determination according to modification No. 18 dated Apr. 21, 1977 (AF-4), was 731,997 cubic yards, a difference of 111,205 cubic

yards. The Government witnesses admitted that between December 1975 and June 1977 to arrive at the final quantity determinations for excavation, data was run through the computer 30 times or more and 5 final computer runs were necessary in order to accomplish the purging of errors and that the first 2 final computer runs had been based on "planned" rather than "as-built" quantities (Tr. 59, 66–67, 234, 253). The record fails to disclose any reasonable explanation or justification for the occurrence of so many errors requiring so many computer runs.

4. Although the work performed by Mr. Hardin, the independent engineer hired by Tiffany, and his crew of professional surveyors clearly resulted in uncovering errors in the Government's calculations, they did not purport to undertake a complete survey of the entire project to come up with accurate or conclusive total calculations of quantities of excavation (Tr. 95–96). Furthermore, the record shows that in the course of making calculations Mr. Hardin used the "planimeter" method of calculation which he admitted was not as accurate as the arithmetic used by the BIA, but stated that it was fast and accurate enough to be within 5 or 10 percent (Tr. 122–123).

5. Mr. Lewis C. Johnson, a former resident engineer for the State of Arizona and an independent consulting engineer at the time of the hearing, testified that he had reviewed the document entitled "Analysis of Earthwork Quantities," prepared by the Government in June of 1976; that he agreed with Mr. Jeff Hardin's figures in reference to excess excavation over the design excavation; that upon his review of pertinent documents including the daily job reports prepared by the Government for this project he could find no evidence of wasting except for one minor instance which Tiffany's project superintendent agreed to correct; and that based upon his experience it was normal custom in the industry for the Government to have a letter of final quantities to the contractor within 30 days after acceptance of the work and final payment to the contractor within 45 days.

Claim for Unpaid Performed Excavation

[1] Based upon our review and study of the entire record in this proceeding, we are convinced that no one will ever know, with reasonable certainty, the precise number of cubic yards of as-built excavation performed by the contractor for which it was entitled to be paid. The evidence adduced provides the Board with no real assurance that the fifth final computer run made by the Government was any more accurate than the third or fourth. We do believe, however, that the fifth was probably more correct than the first or second, because at least, in the fifth run the computer apparently was programmed to determine "as-built" quantities rather than "planned" quantities.

On the other hand, we also have difficulty with Tiffany's figures because of the uncertainty of its position indicated by the wide variance in the amount of its claims from time to time, and secondly because of the inconclusive testimony of its principal witnesses. We have decided, nevertheless, upon weighing all the evidence presented by both parties, that a preponderance favors appellant.

Our specific findings of fact and conclusions regarding this claim are as follows:

1. That the Government was negligent in performing its obligation to present final earthwork quantities to the contractor within a reasonable time and with reasonable accuracy after the project work was approved and accepted by the contracting officer;

2. That no excessive wasting of excavation by the contractor was established by the evidence and, in the circumstances of this case, it was error on the part of the Government to charge Tiffany with 7,290 cubic yards of excessive excavation and waste;

3. That despite the uncertainty of its position and the unsatisfactory and incomplete presentation of quantum evidence, the weight of the evidence, with respect to entitlement in some amount for unpaid excavation, preponderates in favor of the appellant; and

4. That it is impractical in this proceeding for the Board to attempt to arrive at a quantum figure by the application of any mathematical formula, and therefore, a jury verdict approach is appropriate.[4]

Applying the jury verdict approach to the evidence of record, we conclude that Tiffany's claim for additional payment for excavation performed in this project should be allowed in the amount of $25,000.

Claim for Extraordinary Expenses

The Government offered no evidence to refute the expenditure of $17,857 by Tiffany in making its own determinations of quantities prior to presenting claims to the contracting officer. That such sum was expended for attorneys' fees, consulting engineers, professional surveyors, and travel expenses for such purpose prior to the findings of fact and decision by the contracting officer is fully supported by the evidence, and we so find. The Government contends, however, that as a matter of law, this claim is unallowable pursuant to applicable statutes and regulations (Govt. Answer p. 3).

We agree with the Government that an issue of law is presented by this claim and that the claim is unallowable. Allowance of this claim would run counter to the longstanding general rule that legal fees (professional fees) for litigation in the Federal courts, whether for prosecution of a claim or its defense, may not be taxed to either party, and the general rule that legal fees for prosecuting or defending claims in contract appeal proceedings may not be awarded.

---

[4] *See* our decision in *G.T.S. Co., Inc.*, IBCA No. 1077–9–75 (Sept. 15, 1978), 85 I.D. 373, 78–2 BCA par. 13,424, where a jury verdict approach was applied.

Appellant has cited several cases to support this claim and makes a special point of noting that the expenses involved were incurred prior to the final decision of the contracting officer regarding quantities. By citing these cases, however, appellant has shown its misunderstanding of the general rule and the distinction between cost reimbursable type and fixed price type contracts. This case is concerned only with a fixed price type contract. We do not consider the cases cited by appellant to be controlling. They were either out of date, not in point, or distinguishable from the facts here because of specific contract provisions, such as termination settlement clauses, or procurement regulations allowing recovery for professional services as indirect costs.

[2] As we understand the authorities, in the absence of a statute, procurement regulation, or specific contract provision permitting recovery from the Government for the cost of professional services not contributing directly to the performance of a fixed unit price contract, the contractor is precluded from recovering such cost in a proceeding for an equitable adjustment, whether incurred before or after the final decision of the contracting officer.[5] Therefore, since this proceeding does not involve such a statute, regulation, or contract provision, appellant's claim for extraordinary expenses must be denied.

Interest

Appellant improperly claims interest from Jan. 1, 1976, approximately 60 days following acceptance of the contract. Appellant will be allowed interest on the amount of its recovery, not from the date claimed, but in accordance with the provision of paragraph 37, "Payment of Interest on Contractors' Claims," found in "Additions to General Provisions," of the contract. That paragraph provides that interest shall be paid at the rate determined by the Secretary of the Treasury pursuant to the Act of July 1, 1971, P.L. 92-41, 85 Stat. 97, from the date the contractor furnishes to the contracting officer his written appeal under the disputes clause of the contract. According to the record in this case, that date was Feb. 2, 1977.[6]

Decision

Accordingly, Tiffany's claim for unpaid excavation is sustained in the amount of $25,000 with interest allowed thereon as provided by law from Feb. 2, 1977. Its claim for extraordinary expenses is denied.

David Doane
Administrative Judge

I concur:

William F. McGraw
Chief Administrative Judge

---

[5] *See Lear Siegler, Inc.*, ASBCA No. 20040 (Jan. 31, 1979), 79-1 BCA par. 13,687, and the cases cited and discussed therein.

[6] Appeal file, Exhibit 41, a letter addressed to the Board from the contractor dated Aug. 18, 1977, stating that on Feb. 2, 1977, it transmitted its Notice of Appeal to the contracting officer.

APPEAL OF CHICKALOON MOOSE CREEK NATIVE ASS'N, INC.

4 ANCAB 250

Decided *June 16, 1980*

Appeal of Chickaloon Moose Creek Native Ass'n, Inc., from the Bureau of Land Management Decision AA-8489-A2 and AA-8489-B.

1. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Standing—Alaska Native Claims Settlement Act: Conveyances: Reconveyances

Where land selections by a Cook Inlet village corporation pursuant to § 12(a) of ANCSA are rejected by the Bureau of Land Management so that such lands may be conveyed to Cook Inlet Regional Corp., which is obligated to reconvey lands to the village under the terms of an amendment to ANSCA, the village corporation's interest in its rejected land selection and in its ultimate right to reconveyance of land constitutes a property interest affected by a determination of the Bureau of Land Management, sufficient to confer standing under regulations contained in 43 CFR 4.902.

2. Alaska Native Claims Settlement Act: Conveyances: Reconveyances

Where the Secretary of the Interior and Cook Inlet Regional Corp. execute an agreement setting forth the procedure by which land shall be conveyed to the regional corporation for reconveyance to villages within Cook Inlet Region, and such procedure is authorized by Congress in an amendment to ANCSA, the agreement is binding on the Bureau of Land Management and the BLM is required to convey lands to Cook Inlet Regional Corp. pursuant to the terms of the agreement.

3. Alaska Native Claims Settlement Act: Conveyances: Reconveyances

When BLM rejects a village corporation's land selections for the purpose of conveying such lands to Cook Inlet Regional Corp., for reconveyance pursuant to § 4(a) of P.L. 94-456 and associated agreements, the rejection extinguishes the right of the village corporation to receive title from the Federal Government to those lands selected, but does not adjudicate or extinguish the right of the village corporation to receive title from Cook Inlet Region, Inc., to those lands.

4. Alaska Native Claims Settlement Act: Conveyances: Reconveyances

The rights of a village corporation in the Cook Inlet Region to receive title from Cook Inlet Region, Inc., to lands for which it had applied pursuant to § 12(a) of ANCSA are determined by the terms of § 4(a) of P.L. 94-456 and associated agreements.

5. Alaska Native Claims Settlement Act: Conveyances: Interim Conveyance—Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Jurisdiction

Interim conveyance and patent are documents of equal significance in the granting of title under ANCSA and its amendments, unless such amendments provide otherwise. Sec. 4(a) of P.L. 94-456 does not authorize the Secretary of the Interior to grant less than full legal title to Cook Inlet Region, Inc. Therefore, when BLM issues interim conveyance to Cook Inlet Region, Inc. pursuant to P.L. 94-456, the Secretary of the Interior and this Board lose jurisdiction of those interests in lands which have been conveyed and cannot maintain control over such lands pending reconveyance by Cook Inlet Region, Inc.

6. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Jurisdiction

Contractual disputes between the appellant and other corporations are not appeals from findings of Departmental officials within the contemplation of jurisdictional regulations in 43 CFR 4.1(b)(5), nor can they be decided by this Board in connection with such appeals.

APPEARANCES: Elliott T. Dennis, Esq., Edgar Paul Boyko, Esq., Boyko and Davis, on behalf of the Appellant, Chickaloon Moose Creek Native Ass'n. Inc.; Dennis Hopewell, Esq., Office of the Regional Solicitor, on behalf of the Bureau of Land Management; Joyce E. Bamberger, Esq., on behalf of Cook Inlet Region, Inc.

OPINION BY ALASKA NATIVE CLAIMS APPEAL BOARD

SUMMARY OF APPEAL

Chickaloon Moose Creek Native Association, Inc. (Chickaloon), a village corporation within Cook Inlet Region, challenges the method by which the Bureau of Land Management (BLM) seeks to implement P.L. 94-456 and associated agreements. Appellant contends that BLM erred in rejecting certain village selections and conveying the same land to Cook Inlet Region, Inc. (CIRI) for reconveyance to the village. Chickaloon contends that the rejection of its selections affects its rights under the Alaska Native Claims Settlement Act and its amendment, P.L. 94-456, because it acts to extinguish the individual selections thereby giving CIRI unlimited discretion as to which lands it must reconvey to the individual village corporation. Chickaloon seeks to have BLM hold its selections in abeyance pending reconveyance of its lands to it by CIRI. The Board finds that under P.L. 94-456 and the agreement of Aug. 31, 1976, between CIRI and the Department, BLM is obligated to convey to CIRI and cannot simultaneously hold Chickaloon's selection in abeyance because upon conveyance to CIRI, BLM loses jurisdiction over the land.

JURISDICTION

The Alaska Native Claims Appeal Board pursuant to delegation of authority to administer the Alaska Native Claims Settlement Act, 85 Stat. 688, *as amended*, 43 U.S.C. §§ 1601-1628 (1976 and Supp. I 1977), and the implementing regulations in 43 CFR Part 2650 and 43 CFR Part 4, Subpart J, hereby makes the following findings, conclusions and decision.

PROCEDURAL BACKGROUND

Chickaloon timely appealed a decision of BLM dated Nov. 30, 1979, covering land selections under the Alaska Native Claims Settlement Act (43 U.S.C. §§ 1601-1628 (1976 and Supp. I 1977) (ANCSA)). The decision rejected in part certain village selection applications, and approved lands for conveyance to CIRI pursuant to an agreement dated Aug. 31, 1976, between CIRI and the Secretary of the Interior (hereinafter Region/Government agreement) which was authorized in an amendment to ANCSA in the Act of Oct. 4, 1976, § 4(a), P.L. 94-456, 90 Stat. 1934, 1935.

The Board on Feb. 8, 1980, issued an order partially dismissing this appeal as to forty-two sections of land. The grounds for dismissal were that Chickaloon had not selected lands within these forty-two sections and therefore could not be found to claim a property interest in such lands within the meaning of standing regulations in 43 CFR 4.902. Cook Inlet Region, Inc., had strongly urged segregation and conveyance of these forty-two sections so that such lands could be conveyed to CIRI, thereby enabling CIRI and two other CIRI villages (Knik and Tyonek) to perform their obligations under an agreement with the Alaska Power Authority (APA), allowing APA to perform a feasibility study for the Susitna Dam Project on lands including the forthy-two sections.

While Chickaloon contended that lands it had selected would be impacted by performance of the agreement with APA, to which Chickaloon was not a party, the Board found that this did not constitute a claim of property interest in lands *not* selected by Chickaloon. Insofar as Chickaloon challenged the validity of the agreement between APA, CIRI, and other CIRI villages, the Board found that contractual disputes between the appellant and other corporations are not appeals from findings of Department officials within the contemplation of jurisdictional regulations in 43 CFR 4.1(b)(5), and could not be decided by this Board in connection with such appeals. The Board then directed Chickaloon to file its Statement of Standing and Statement of Reasons in this appeal, regarding lands not affected by the order of partial dismissal.

Chickaloon, on Feb. 13, 1980, filed its statement of standing and reasons, along with a motion for reconsideration of the partial dismissal. The Board denied the motion because BLM, immediately following the partial dismissal, had conveyed the affected forty-two sections of land to CIRI and when a patent or interim conveyance to land has been issued, this Board and the Department of the Interior lose administrative jurisdiction over that land. (*Appeal of Eklutna, Inc.*, 1 ANCAB 305, 84 I.D. 105 (1977) [VLS 75-1]; *Appeal of James W. Lee*, 3 ANCAB 334 (1979) [VLS 79-11].) Therefore the only issues remaining in this appeal relate to lands other than the forty-two sections which were the subject of the partial dismissal.

CIRI, on Mar. 19, 1980, moved to dismiss Chickaloon on the grounds that they have failed to allege a sufficient property interest in lands affected by the decision appealed to confer standing before the Board.

Contentions of Parties

Chickaloon

Chickaloon asserts three grounds for standing. First, in the decision appealed, BLM rejects Chickaloon's separate selections, and approves for conveyance to CIRI all the lands selected by CIRI villages, including those selected by Chickaloon, in one unsegregated parcel. Second, these commingled parcels are subject to CIRI's future determination as to which lands will be reconveyed to which village, and Chickaloon in the interim is a beneficiary and equitable title holder in the entire parcel. Third, Chickaloon is a party to the agreement of Aug. 28, 1976, between CIRI and its villages (hereinafter Region/Villages agreement) and is a member of the Cook Inlet Deficiency Land Management Association, which was organized to manage the land here in dispute.

Chickaloon asks the Board first to rule on the propriety of BLM's rejection of Chickaloon's separate land selections, and to clarify whether BLM, by rejection of individual village selections and conveyance to CIRI, in fact caused a merger of all such village selections subject to later reconveyance to individual villages by CIRI. If this was not the effect of the decision appealed, then Chickaloon seeks modification of the DIC to eliminate rejection of the individual village selections and hold such selections in abeyance pending conveyance to CIRI and reconveyance to the villages pursuant to § 4(a) of P.L. 94–456, *supra*, and the agreements of Aug. 28 and Aug. 31, 1976. Chickaloon asserts that the agreements are not private contracts outside the enforcement jurisdiction of the Department, because BLM relies on them in its decision. Chickaloon asserts that the Region/Villages agreement of Aug. 28, 1976, is incorporated in the Region/Government agreement of Aug. 31, 1976, as Appendix B thereto.

Chickaloon asserts that the Region/Villages agreement creates a Board comprised of representatives from each village to manage land conveyed to CIRI for reconveyance to the villages. All village representatives on the Board, including Chickaloon, can veto any decision affecting such village's land selections. The agreement with the APA for a feasibility study on the Susitna Dam Project is invalid because the dam project would have an environmental impact on the land selected by Chickaloon; Chickaloon was not notified of the meeting at which the agreement was signed; and had Chickaloon been notified, it would have vetoed the agreement. Chickaloon argues that the validity of the APA agreement is within the jurisdiction of the Board because the decision of BLM, here appealed, derives its authority from the Region/Government agreement of Aug. 31, 1976, which in turn incorporates the Region/Villages agreement of Aug. 28, 1976, providing for creation of the Board through which Chickaloon would have exercised its veto.

Cook Inlet Region, Inc.

CIRI has moved to dismiss Chickaloon on the grounds that they lack a property interest affected by the decision appealed even though the decision specifically rejected selection applications filed by Chickaloon. CIRI contends that a rejection of Chickaloon selections, in order to convey the same lands to CIRI for reconveyance, was proper under the Region/Villages agreement. CIRI asserts that by signing the agreement, filing selections under the four methods referenced in the agreement, and participating in the Deficiency Land Management Association, Chickaloon waived any right to appeal conveyance under the terms of the agreement.

CIRI contends that since they must reconvey to each village based on the village's land selection and priorities, the selections are not merged into an aggregate parcel, as Chickaloon claims, but, on the other hand, claims involving reconveyance are not ripe for appeal until the reconveyance has taken place. Finally, CIRI argues that the agreement does not grant Chickaloon independent standing. CIRI contends that the only means by which Chickaloon can protect its property interest in the disputed lands is for the land to be conveyed to CIRI, for eventual reconveyance pursuant to the agreement between CIRI and its villages.

BLM

BLM asserts that Chickaloon has standing because its 12(a) selection is affected by the BLM decision here appealed. BLM contends that it was required by the Region/Government agreement, ratified by § 4(a) of P.L. 94–456, *supra*, to convey the disputed land to CIRI. CIRI's reconveyances to its member village corporations are governed by the Region/Villages agreement to which BLM is not a party.

As to Chickaloon's request that BLM hold its individual selections in abeyance pending CIRI's reconveyances, BLM responds that it cannot do so because upon conveyance to CIRI, BLM loses jurisdiction over the land and therefore cannot maintain control over that portion of the conveyance to CIRI which had originally been selected by Chickaloon.

Further, the Board cannot order reconveyance before final action on eligibility of the disputed villages, Salamatoff and Alexander Creek, because the Region/Villages agreement requires CIRI to hold lands in trust for the villages pending litigation on eligibility. As to Chickaloon's contention that its dispute is not a private one with CIRI, BLM disagrees on the grounds that the Department of the Interior was not a party to the Region/Villages agreement and the agreement is subject to change by the parties.

Statues, Regulations, and Agreements

Public Law 94–456, *supra*, provides in relevant part:

> **Sec. 4.(a) The Secretary is authorized to convey lands under application for selection by Village Corporations within Cook Inlet Region to the Cook Inlet Region, Incorporated, for reconveyance by the Region to such Village Corporations. Such lands shall be conveyed as partial satisfaction of the statutory en-**

> titlement of such Village Corporations from lands withdrawn pursuant to section 11(a)(3) of the Alaska Native Claims Settlement Act (hereinafter, "The Settlement Act"), and with the consent of the Region affected, as provided in section 12 of the Act of January 2, 1976 (89 Stat. 1145, 1150), from lands outside the boundaries of Cook Inlet Region. This authority shall not be employed to increase or decrease the statutory entitlement of any Village Corporation or Cook Inlet Region, Incorporated. For the purposes of counting acres received in computing statutory entitlement, the Secretary shall count the number of acres or acre selections surrendered by Village Corporations in any exchange for any other lands or selections.

The authority and jurisdiction of the Board is set forth in regulations contained in 43 CFR 4.1(b)(5) which provide: "*Alaska Native Claims Appeal Board.* The Board considers and decides finally for the Department appeals to the head of the Department from findings of fact or decisions rendered by Departmental officials in matters relating to land selection arising under the Alaska Native Claims Settlement Act."

Standing before the Board is governed by regulations in 43 CFR 4.902 which provide "[a]ny party who claims a property interest in land affected by determination from which an appeal to the Alaska Native Claims Appeal Board is allowed, or an agency of the Federal Government, may appeal as provided in this subpart."

The Region/Government agreement of Aug. 31, 1976, between Cook Inlet Region, Inc., and Thomas S. Kleppe, then Secretary of the Interior, provides in pertinent part:

> A. The Secretary shall, subject to valid existing rights, convey, as soon as reasonably possible, the surface and subsurface estate in all public lands described in Appendix A to CIRI.
>
> B. CIRI shall reconvey the surface estate of such lands to the Village Corporations within the region pursuant to an agreement between CIRI and the affected Village Corporations, which agreement is attached as Appendix B to this agreement and which agreement may be modified by the parties thereto.
>
> * * * * * * *
>
> F. Only the following lands shall be conveyed to Village Corporations within Cook Inlet Region:
>
> * * * * * * *
>
> 3) Lands conveyed by CIRI pursuant to this section; and pursuant to the Term and Conditions as clarified August 31, 1976.
>
> G. CIRI shall have the power to administer the lands conveyed pursuant to this Agreement in accordance with the Region-Village agreement attached as Appendix B.

Appendix A lists, under the heading Talkeetna Mountains, Seward meridian, Alaska, all the lands which remain as the subject of this dispute; *i.e.:*

> *T. 32 N., R. 1 E.,*
> Sec. 33, all
> *T. 31 N., R. 2 E.,*
> Secs. 5, 6, 13, all
> *T. 31 N., R. 3 E.,*
> Secs. 18 and 23, all
> *T. 31 N., R. 4 E.,*
> Secs. 10, 15 and 20, all
> *T. 32 N., R. 1 W.,*
> Secs. 25 through 28, 31, 32, 33, and 36, all

Appendix B entitled, ANCSA SECTION 12(a) CONVEYANCE AGREEMENT BETWEEN COOK INLET REGION, INC., AND THE VILLAGE CORPORATIONS OF NINILCHIK, KNIKATNU, ALEXANDER CREEK, SALAMATOFF, TYONEK, CHICKALOON AND SELDOVIA [the Region/Villages agreement], provides in pertinent part:

WHEREAS:

1. There have arisen certain questions about the validity of selections of the Village Corporations in Cook Inlet Region in areas withdrawn by the Secretary under Section 11(a)(3) of ANCSA; and

2. Both the Cook Inlet Region and the Village Corporations desire a legislative resolution that shall insure that the Village Corporations receive their statutory entitlement under ANCSA; and

3. A legislative resolution has been proposed that would assure rapid conveyance to the Region and the Village Corporation of many lands within such deficiency areas; and

4. Such a resolution can be accompanied by fair administration of such lands by Cook Inlet Region and reconveyance to the Village Corporation as rapidly as possible:

IT IS THEREFORE AGREED THAT:

1. Cook Inlet Region, and the undersigned (hereinafter referred to as Village Corporations) support the legislation attached as Appendix A to this agreement or a version substantially conforming thereto;

2. There shall be formed a Board with one representative from each of the Village Corporations that has selected lands under Section 12(a) within the areas to be conveyed to Cook Inlet Region under the legislation described in Appendix A. It shall be the function of this Board exclusively to exercise the consent powers described in Paragraph 3(C) of this Agreement. Each Village Corporation shall designate its own representative to the Board. The term of the Board shall expire at the time total 11(a)(3) conveyance as required by ANSCA has been received by all the affected Village Corporations party to this agreement. The operation of the Board shall be governed by bylaws established within one year hereof. In the event of disagreement the matter shall be arbitrated under the rules of the American Arbitration Association.

3. Upon receipt of a conveyance of such deficiency land from the Secretary of the Interior pursuant to the legislation attached as Appendix A, Cook Inlet Region will reconvey the surface estate to such land to the Village Corporation entitled thereto under their Section 12(a) selections as rapidly as possible, guided by the following standards:

A. Unless the affected Village Corporations otherwise agree, their Sections 12(a) selections, including the specific tracts selected and the priorities listed in those selections shall govern.

B. Where there is no conflict among the Village Corporations arising from the alternate methods of filing (Methods A, B, C and D), see Appendix B, and where it is clear that a Village Corporation will be eligible for the land and will reach the parcel in its priorities, the Region shall immediately reconvey the land such reconveyance to be made within 10 working days of receipt of such conveyance to the Region from the Secretary.

C. Where, as a result of conflict in the above stated Section 12(a) filings or where, as a result of outstanding litigation concerning Village Corporation eligibility, * * * the right of a Village Corporation to immediate reconveyance is not certain, Cook Inlet Region shall hold and administer the lands to which the Village Corporation will ultimately be entitled in trust for the benefit of such Village Corporations, with the following limitations:

(i) Cook Inlet Region shall not develop or cause to be developed any portion of the surface or subsurface estate of any such lands held in trust by the Region without the consent of the Board described in Paragraph 2.

> (ii) Such provision shall apply until the Section 12(a) entitlement of the Village Corporations is satisfied.
>
> D. Cook Inlet Region shall reconvey such lands as soon as the uncertainties are resolved.
>
> * * * * *
>
> 5. Except as specifically provided in this agreement, the provisions of ANCSA are fully applicable to this agreement, such provisions to be insured by the legislation attached.

The agreement is signed by the president or general manager of each village corporation listed in the caption and by the president of Cook Inlet Region, Inc.

DECISION

Standing

To have standing to appeal, Chickaloon must claim a property interest in lands affected by the decision appealed. (43 CFR 4.902.) It is undisputed that Chickaloon is entitled to receive conveyance to certain lands selected under § 12(a) of ANCSA (at a minimum, approximately 55,682 acres); that Chickaloon filed applications for the land here in dispute; that Chickaloon's individual land selections were rejected by BLM in the decision here appealed; and that the lands selected by Chickaloon were approved for conveyance to CIRI for reconveyance pursuant to P.L. 94–456, *supra*, and the agreements.

With regard to those lands for which it filed the selection applications rejected by BLM in the decision here appealed, the Board rules that Chickaloon has standing.

As the Board has stated in an earlier appeal (*Appeal of State of Alaska*, 3 ANCAB 196, 86 I.D. 225 (1979) [VLS 78–42]), the standing requirement in 43 CFR 4.902 focuses on an interest in land claimed by an appellant, and on the relationship between that interest and the determination being appealed. The interest claimed must be a property interest, and it must be affected by the determination.

The interest claimed by Chickaloon is the land selected for its land entitlement under ANCSA, to which the village will eventually receive patent. This is clearly a property interest within the contemplation of regulations in 43 CFR 4.902.

As to whether this property interest is affected by the decision appealed, that decision rejects the land selection application filed individually by Chickaloon, and approves conveyance of the same lands to CIRI for reconveyance.

Chickaloon does not dispute that P.L. 94–456, *supra*, authorizes the Secretary "to convey lands under application for selection by Village Corporations * * * to the Cook Inlet Region, Incorporated, for reconveyance by the Region to such Village Corporations." Rather, Chickaloon disputes the method by which BLM purports to implement the statutory amendment and its agreements. Chickaloon asserts that the form and language of the Decision to Issue Conveyance adversely affect their property interest.

Whether this decision by BLM is considered to affect Chickaloon adversely, as the appellant contends, or whether, as CIRI asserts, it affects them favorably by removing procedural impediments to their receipt of land, it is clear that there is a legitimate question as to whether the decision does affect Chickaloon's interest in its land entitlement under ANCSA.

[1] Where land selections by a Cook Inlet village corporation pursuant to § 12(a) of ANCSA are rejected by BLM so that such lands may be conveyed to Cook Inlet Regional Corp. which is obligated to reconvey lands to the village under the terms of an amendment to ANCSA, the village corporation's interest in its rejected land selection and in its ultimate right to reconveyance of land constitutes a property interest affected by a determination of BLM, sufficient to confer standing under regulations contained in 43 CFR 4.902.

Accordingly CIRI's motion to dismiss Chickaloon for lack of standing is denied.

The issues raised by the appellant are:

(1) Whether BLM erred by rejecting Chickaloon's land selections under § 12(a) of ANCSA and approving conveyance of such lands to CIRI?

(2) Whether as a result of BLM's rejection of Chickaloon's land selections, the choice of lands to be subsequently reconveyed by CIRI to the village corporations lies within the discretion of CIRI or is controlled by each village's individual land selections?

(3) Whether the agreement between APA, CIRI and the CIRI villages of Tyonek, Salamatoff, Seldovia, Knik and Ninilchik is invalid because executed without the concurrence of Chickaloon as required by the bylaws of the Cook Inlet Deficiency Land Management Association?

With regard to the first issue, the Board affirms BLM; as to the second issue, the Board finds the decision here appealed does not adjudicate Chickaloon's rights of reconveyance from CIRI; as to the third issue, the Board finds it outside the jurisdiction of the Department of the Interior to adjudicate contractual disputes between third parties.

The agreement of Aug. 31, 1976, between CIRI and the Department specifically provides in paragraph A, "The Secretary shall, subject to valid existing rights, convey, as soon as reasonably possible, the surface and subsurface estate in all public lands described in Appendix A to CIRI." As previously noted the lands here in dispute are included in those described in Appendix A. Sec. 4(a) of P.L. 94-456, *supra*, enacted in part to implement this agreement, provides, "The Secretary is authorized to convey lands under application for selection by Village Corporations within Cook Inlet Region to the Cook Inlet Region, Incorporated, for reconveyance by the Region to such Village Corporations." Under the terms of the agreement, authorized by P.L. 94-456, BLM was obligated to convey Chickaloon's land selections to CIRI, for later reconveyance.

[2] Where the Secretary and Cook Inlet Regional Corp. execute an agreement setting forth the procedure by which land shall be conveyed to the regional corporation and to village corporations for villages within that region, and such procedure is authorized by Congress in an amendment to ANCSA, such agreement is binding on BLM and BLM is required to convey lands to the regional corporation pursuant to the terms of the agreement.

Chickaloon contends that BLM's rejection of its land selection prior to conveyance of the same lands to CIRI extinguishes Chickaloon's selection, resulting in a merger of all land selections, thereby leaving the choice of lands to be reconveyed to them entirely within the discretion of CIRI. Asserting that this result was not intended by the agreement between the Secretary and CIRI, Chickaloon seeks to have BLM hold its land selections in abeyance until CIRI reconveys these lands to Chickaloon.

The Board finds that BLM's rejection of Chickaloon's selection in the DIC was not an adjudication of Chickaloon's rights of reconveyance pursuant to P.L. 94-456, *supra*, and its agreements and therefore does not result in either extinguishment or merger of individual village land selections as between CIRI and its village corporations.

[3] When BLM rejects a village corporation's land selections for the purpose of conveying such lands to Cook Inlet Region Corp. for reconveyance pursuant to § 4(a) of P.L. 94-456, *supra*, and agreements between the villages and CIRI, the rejection extinguishes the right of the village corporation to receive title from the Federal Government to those lands selected but does not adjudicate or extinguish the right of the village corporation to receive title to those lands selected from CIRI.

[4] The rights of a village corporation in the Cook Inlet Region to receive title from Cook Inlet Region, Inc., to lands for which it had applied pursuant to § 12(a) of ANCSA are determined by the terms of § 4(a) of P.L. 94-456, *supra*, and associated agreements. It is clear from a review of the amendment and agreements that the applications for selection are the basis of the entire reconveyance process and that no action taken by BLM to clear its records for conveyance to CIRI could affect the reconveyance terms as contained in the amendment or agreements.

CIRI does not dispute this interpretation but, rather, asserts in their brief filed Mar. 19, 1980, that copies of each village's selections under the four alternate methods shall be used by CIRI to issue reconveyances, in accordance with the agreements of Aug. 28 and Aug. 31, 1976. Filed with CIRI's brief is an affidavit to this effect by their land manager.

As to Chickaloon's request that the Department of the Interior hold its land selections "in abeyance" pending reconveyance by CIRI, the

Board finds no authority for such action.

Chickaloon in effect seeks administrative enforcement of paragraph B of the Regional/Government agreement of Aug. 31, 1976, which provides: "CIRI shall reconvey the surface estate of such lands to the Village Corporations within the region pursuant to an agreement between CIRI and the affected Village Corporations."

However, the agreement provides no such enforcement mechanism. The manner in which CIRI is to reconvey to the village corporations is governed by the Region/Villages agreement of Aug. 28, 1976. While this agreement was referenced as governing reconveyance in the Region/Government agreement of Aug. 31, 1976, there is no authorization for the BLM to withhold or condition conveyance to CIRI in order to enforce the Region/Villages agreement.

There being no authority in the Cook Inlet Region/Government agreement to do otherwise, BLM's conveyance of lands to CIRI, pursuant to the amendment and agreement, must be affirmed and has the same legal effect as all conveyances of land by BLM under ANCSA.

As the Board has already ruled, interim conveyance and patent are documents of equal significance in the granting of title under ANCSA, and when interim conveyance has been issued, the Secretary and this Board lose jurisdiction over those interests in land which have been conveyed (*Appeal of James W. Lee, supra*). Upon conveyance of the disputed land to CIRI as required by the agreement of Aug. 31, 1976, BLM loses administrative jurisdiction over that land and cannot hold any part of it "in abeyance" in order to protect Chickaloon's interest in reconveyance from CIRI.

[5] Interim conveyance and patent are documents of equal significance in the granting of title under ANCSA and its amendments, unless such amendment provides otherwise. Sec. 4(a) of P.L. 94–456, *supra*, does not authorize the Secretary of the Interior to grant less than full legal title to CIRI. Therefore, when BLM issues interim conveyance to CIRI pursuant to P.L. 94–456, *supra*, the Secretary and this Board lose jurisdiction of those interests in lands which have been conveyed and cannot maintain control over such lands pending reconveyance by CIRI.

The foregoing conclusion on issues 1 and 2 are dispositive of this appeal. The Board notes for the record that Chickaloon also attacks the validity of the agreement executed by CIRI, other CIRI villages, and the APA, on the grounds that Chickaloon, under the bylaws of the Cook Inlet Deficiency Land Management Association, had the power to veto such agreement but was wrongfully deprived of the opportunity to do so.

[6] The Board finds that this matter is not within its jurisdiction and accordingly repeats its finding in the previous order of partial dismissal that contractual disputes be-

tween the appellant and other corporations are not appeals from findings of Departmental officials within the contemplation of jurisdictional regulations in 43 CFR 4.1(b)(5), nor can they be decided by this Board in connection with such appeals.

This represents a unanimous decision of the Board.

JUDITH M. BRADY
Administrative Judge

ABIGAIL F. DUNNING
Administrative Judge

JOSEPH A. BALDWIN
Administrative Judge

APPEALS OF CEN-VI-RO OF TEXAS, INC.

IBCA-718-5-68 and IBCA-755-12-68
Decided *June 27, 1980*

Contract No. 14-06-D-5028, Specifications No. DC-6000; Contract No. 14-06-D-5244, Specifications No. DC-6130, Canadian River Project, Texas.

Revised claim, sustained in part.

1. Contracts: Disputes and Remedies: Burden of Proof

In a case remanded to the Board by the Court of Claims in which the Board had previously found that 1,013 concrete pipes were wrongfully rejected and the Court of Claims afforded the contractor an opportunity to show by record evidence that more pipes were so rejected, but the contractor offered no probative evidence of additional wrongful rejections, the Board declined to increase the equitable adjustment allowed in its original decision.

2. Contracts: Construction and Operation: Changes and Extras—Contracts: Disputes and Remedies: Equitable Adjustments

Where an earlier decision of the Board upheld the Government's interpretation of internal diameter tolerances in the manufacture of concrete pipe but the Court of Claims held that the tolerances were too strict and remanded the appeal to the Board for reconsideration of the equitable adjustment to include the effects of erroneous rejections of pipe for small diameters, the Board found that the effects of the Government's actions were so intermingled with the effects of actions for which the contractor was responsible that no formula could be devised to make a precise apportionment of the causes of inefficiencies. In the absence of any sound basis for a precise determination, the Board utilized a jury verdict approach to allow the contractor an equitable adjustment for the effects of the Government's actions early in the production of concrete pipe.

3. Contracts: Construction and Operation: Allowable Costs—Contracts: Disputes and Remedies: Burden of Proof

Where, upon remand from the Court of Claims, the Board was directed to make a specific finding as to whether, if pipes rejected for small diameters or marked as special hydros had been available for use, the supply of acceptable pipe would have been sufficient to allow pipe laying operations to continue and the contractor merely alleged that its average production of pipe was greater than the average number of pipe it was required to furnish to its pipe-laying subcontractor, the contractor's allegations obscured the fact that its own production and construction schedule called for specific sizes and lengths of pipe at specific times. The Board found that the contractor's total production was insufficient to maintain the contractor's own pipe laying schedule and therefore denied the contractor's claim for reimbursement of the payment it made to settle the delay claim of the subcontractor.

4. Contracts: Construction and Operation: General Rules of Construction

Where the contractor claimed interest for the cost of borrowing money to finance the Government caused increase in costs under a contract awarded before Government regulations required an interest clause, the Board followed the Court of Claims' rule laid down in *Dravo Corp.* v. *United States*, 594 F.2d 842 (Ct. Cl. 1979), and denied the contractor's interest claims.

APPEARANCES: Mr. H. A. Federa, Secretary & General Counsel, Cen-Vi-Ro of Texas, Inc., c/o Raymond International, Inc., Houston, Texas, for Appellant; Mr. Henry J. Strand, Department Counsel, Denver, Colorado, for the Government.

OPINION BY ADMINISTRATIVE JUDGE PACKWOOD

INTERIOR BOARD OF CONTRACT APPEALS

These appeals come before the Board on remand from the Court of Claims for reconsideration to determine whether appellant is entitled an increased equitable adjustment as a result of the court's finding that the Government imposed unreasonably strict inside diameter tolerances for concrete pipe manufactured by appellant.

The claims of Cen–Vi–Ro of Texas, Inc., arose under two construction contracts of the Department of the Interior in the Canadian River Project. The project involved several construction contracts calling for a total of 322 miles of pipeline, pumping plants and related work to furnish water to 11 cities in the Texas Panhandle. Cen-Vi-Ro was the prime contractor in Contract No. 14–06–D–5028, Specification DC–6000, which provided for pipe manufacture, pipe laying, and related work for approximately 90 miles of pipeline. The reinforced concrete pipe was manufactured by Cen–Vi–Ro and all other work was subcontracted to R. H. Fulton. In Contract No. 14–06–D–5244, Specification 6130, R. H. Fulton was the prime contractor for construction of approximately 140 miles of pipeline and Cen-Vi-Ro was the subcontractor for the manufacture of concrete pipe. The estimated contract price in DC–6000 was $12,464,227 and in DC–6130 it was $8,785,519.02.

Cen-Vi-Ro of Texas, Inc., was organized as a wholly-owned subsidiary of Raymond International, Inc., for the purpose of bidding on contracts in the Canadian River Project. The name is derived from centrifugation, vibration, and rotation, the three major steps in a pipe manufacturing process developed by a sister corporation in California. Cen-Vi-Ro had no manufacturing facilities when it was awarded its first contract. It built facilities at Plainview, Texas, referred to as the north plant, to make larger sized pipe for DC–6000 and later built facilities, referred to as the south plant, to manufacture smaller diameter pipe. Production of pipe in the north plant began on

May 29, 1964, and in the south plant on Apr. 2, 1965.

At the beginning of production at the newly constructed north plant, some machine operators and supervisory personnel were brought in from California, but the principal labor supply was derived from the local area and many of the new employees were inexperienced in production work.

From the beginning of production to May 1965, Cen-Vi-Ro experienced a number of production difficulties including problems in making reinforcement cages, in using the 20-foot spinning machine, in fallouts where sections of concrete fell or pulled away from the reinforcing steel, in rocky bells where aggregates were exposed in bell areas, with longitudinal and circumferential cracks, with unconsolidated concrete in bell and spigot areas, and with flaking and cracking interiors. In addition, by Oct. 15, 1964, the Government had marked 1,045 pieces of pipe as defective because of small diameters. By Oct. 17, 1964, 477 pipes had been marked for special hydrotests. Total production through October 1964 was approximately 3,200 units. As a result of a shortage of pipe, pipe laying was suspended on Nov. 21, 1964, and was resumed on May 10, 1965.

Cen-Vi-Ro took a number of actions to reduce the number of rejections for small diameters, including decreasing the quantities of mix, milling down the end rings on the forms, building up the rollers and grinding the interiors of rejected pipe. By December 1964, small diameters were about 3 percent of production and by January 1965 small diameters were no longer a problem. Correction of the small diameter problem was one cause of other problems with production of pipe having flaking and scaling interiors. Production of pipe with bad interiors was most prevalent in February and March 1965. About Apr. 12, 1965, the Government relaxed its criteria for measuring internal diameters of the pipe and began accepting pipe in accordance with appellant's interpretation of the specification. The production of pipe with bad interiors had almost disappeared by May 1965.

Appellant submitted claims totaling $2,147,554 under DC-6000 and $976,926 under DC-6130, contending that it had been subjected to more rigorous standards for the production of pipe than the contract required.[1]

In its earlier opinion, the Board allowed appellant $218,180.83 on DC-6000 claims and $5,348.95 on DC-6130 claims.[2] Following the Board's decision, Cen-Vi-Ro instituted suit in the Court of Claims, which found that the Board's interpretation of the internal diameter tolerances was not in accordance with the specification. The court remanded the case to the Board for reconsideration of the equitable adjustment in accordance with the court's decision.

---

[1] The statement of facts is summarized from pages 2 through 9 of the Trial Judge's proposed decision for the Court of Claims, which pages were adopted by the Court without change in the order of remand.

[2] Cen-Vi-Ro of Texas, Inc., IBCA Nos. 718-5-68 and 755-12-68 (Feb. 7, 1973), 80 I.D. 29, 73-1 BCA par. 9903.

The Board notes that the claims under both DC-6000 and DC-6130 were consolidated before the Court of Claims and both were remanded although no small diameter were encountered under DC-6130. Since the court did not overrule the Board's findings with respect to DC-6130 and production of pipe for that specification was not afflicted with small diameter problems, reconsideration of the equitable adjustment will be limited to determining the effect of the small diameter interpretation on pipe production under DC-6000.

After remand to the Board, appellant submitted its revised claim in the following form:

Item I. Disruption Period May 15, 1965 through September 1965. $309,821.96×15= $46,473.29 (+$309,821.96) --------	$356, 295. 25
Item II. Disruption Period September 1, 1964 through May 15, 1965, $510,842.82×.15= $76,626.42 (+$510,842.82) --------	587, 469. 24
Item III. Cost of Rejected Pipe. $174,916.81X.15= $26,237.52 (+$174,916.81) --------	201, 154. 33
Item IV.A. Substituted Pipe. $17,554.91×.15= $2,633.24 (+$17,554.91) -	20, 188. 15
Item IV.B. Payment to Subcontractor for Delay in Pipe Laying. $100,000 ×.15=$15,000 (+$100,000) ----------	115, 000. 00
Item IV.C. Cost of Land Rented for Pipe Storage. $18,000×.15=$2,700.00 (+$18,000) -----------	20, 700. 00
Item IV.D. Costs Resulting from Reduction of the Lot Test Period. $1224.96×.15=$183.74 (+$1224.96) -----------	1, 408. 70
Total ---------------	1, 302, 215. 67

Although the contracts in question were awarded long before procurement regulations required an interest clause, appellant has also claimed interest for the cost of borrowing money to perform the extra work caused by the Government's actions.

Before addressing the elements of appellant's claim, we will first examine appellant's motions to expunge evidence.

Appellant's Motions to Expunge Evidence

At the hearing in Houston, Texas, after remand to the Board the Government offered in evidence, as Government Exhibit 160, copies of two letters which Cen-Vi-Ro had furnished to the Government on discovery. Appellant objected to the introduction of the exhibit, claiming that the two letters were privileged communications covered by the attorney-client privilege (Tr. 2489). The letterhead of the first letter identified its author as both secretary and general counsel of Raymond International, the parent corporation of Cen-Vi-Ro. It was not clear from the face of the letter in which capacity the author was acting when he prepared the letter. The second letter in response to the inquiries in the first set forth certain preliminary cost figures regarding Cen-Vi-Ro's claim. Since neither letter gave any indication that the parties were attorney and client, the exhibit was admitted over appellant's objection.

After the hearing, appellant moved the Board to expunge Exhibit 160 from the record since the general counsel had been authorized by the president of the company to act as its attorney in pursuing its claim against the Government. The motion was denied and appellant asked for reconsideration of the ruling.

On reconsideration, the Board now finds that, although the letters do not clearly show that they were written as a part of an attorney-client relationship, the letters do not clearly rule out such a possibility. Accordingly, Government's Exhibit 160 is hereby stricken and expunged from the record as a privileged communication between attorney and client.

With respect to Government Exhibit 179, entitled Scheduled and Actual Pipe Production and Construction, appellant objected to its admission on the ground that it was not an original document and appellant had not had time to examine the documents from which the summaries were derived in order to verify the accuracy of the exhibit (Tr. 2939). The scheduled production and scheduled construction figures were derived from Exhibit 77 which was received in evidence at the first hearing. The backup documentation for the remaining figures was present in the hearing room and the ruling on admissibility of the exhibit was deferred until appellant could check the documentation (Tr. 2941). At the conclusion of the hearing, appellant had not checked the documentation. Exhibit 179 was admitted but the record was left open to give appellant an opportunity to examine the documentation and furnish any different figures it might derive therefrom (Tr. 3034).

After the conclusion of the hearing, the Government furnished appellant a corrected copy of Exhibit 179 which increased by 20 feet the cumulative totals of 66-inch "A" wall pipe which were accepted for shipment in September and October 1964. When Appellant responded that it had no objection to Exhibit 179, the Government then furnished to the Board a corrected copy with the two corrections made in red ink.

Appellant thereafter moved the Board to strike the corrected copy of Exhibit 179 and the letter which accompanied it on the ground that it was an attempt by the Government to place matters in evidence after the record was closed. Appellant's position is correct. The record was left open for appellant to examine the backup data for Exhibit 179 and to submit any different figures it might derive therefrom, but the record was not left open for the Government to submit further revisions of the exhibit.

Accordingly, the Board hereby strikes the corrected copy of Exhibit 179, and the cover letter which furnished it, from the record. As indicated below, no finding of fact with respect to the cumulative totals of pipe accepted for shipment in September and October 1964 is necessary for the Board's decision in any element of appellant's claim.

I. Disruption Period from May 15, 1965, through September 1965

In its revised claim before the Board, Cen-Vi-Ro claimed disruption costs for all 2,240 pipe units rejected for scaling during the May 15, 1965, inventory, and also for 214 pipe units rejected for fallouts, 233 pipe units rejected for rocky bells, and 500 special hydrotests.

[1] Cen-Vi-Ro's claim for disruption costs for all 2,240 pipe units rejected for scaling was presented to the Court of Claims. Pages 27 and 28 of the trial judge's recommended decision, which were affirmed and adopted by the court without modification, contain the following observations and ruling:

> Inasmuch as 1,013 pipes previously rejected were accepted in September 1965, the IBCA considered that it was highly unlikely that those units required any substantial repairs and accordingly ruled that they should not have been rejected. Plaintiff contends that an equitable adjustment should have been permitted for disruption costs on all 2,240 pipes rejected for scaling during the May 15 inventory, rather than the 1,013 units allowed by the IBCA. Although the bureau's misinterpretation of the small diameter tolerances clearly is one cause in the sequence that led to rejections for flaking and scaling, rejections classified as such were also made because of bad interiors and for cracking, and the record is not clear as to the extent such conditions were present in additional pipes. Unless plaintiff on remand can provide record information sufficient to establish entitlement to an increase equitable adjustment, because the additional pipes were rejected wrongfully, this ruling of the IBCA should stand.

Cen-Vi-Ro did not take advantage of the opportunity afforded it by the Court of Claims and it presented no record information to establish that more than 1,013 pipe units were wrongfully rejected. Instead of record information, Cen-Vi-Ro merely offered the argument that the Board's original opinion did not consider that the Government should be responsible for pipes with defects which flowed from Cen-Vi-Ro's efforts to eliminate small diameter pipes.

The Board's finding that efforts to avoid small diameter pipes were the primary cause of flaking and scaling interiors means only that those efforts were first in order of occurrence. As stated by the court, above, the Government's misintrepretation of the small diameter tolerances clearly is one cause in the sequence that led to rejections for flaking and scaling. It is equally clear that other causes were present, but appellant's repeated allegations that rejection of all 2,240 pipes flowed from the small diameter problem do not resolve the question whether more than 1,013 units were improperly rejected. Allegations are not a substitute for proof.

In view of the failure of proof, the Board's previous ruling that 1,013 pipes were improperly rejected for scaling is found to be correct in accordance with the guidelines given in the court's decision cited above.

Cen-Vi-Ro also claimed disruption costs for 214 pipes rejected for fallouts and 233 pipes rejected for rocky bells at the May 15, 1965, inventory. At the hearing held after remand from the Court of Claims, appellant introduced testimony from Mr. William Provan, President of Cen-Vi-Ro Concrete Pipe and Products, a wholly owned subsidiary of Concrete Pipe and Products Co., of Richmond, Virginia, companies which have no association with Cen-Vi-Ro of Texas, Inc., the appellant (Tr. 2532–2608). Although appellant did not fully articulate its intention, it apparently intended to present Mr. Provan as an expert witness with respect to production of pipe by the Cen-Vi-Ro process. On cross-examination, Mr. Provan testified that he was not an engineer, and that his education had been in the field of business administration. His only training in concrete mixes and pipe production were various short courses in production given by the American Concrete Pipe Association. Mr. Provan stated that he did not consider himself to be an expert on concrete mixes and he did not hold himself out as an expert on engineering matters (Tr. 2560–2561). Mr. Provan further testified that he had never used a 16-foot machine or a 20-foot machine in his operations. His experience was limited to use of 12-foot machines except for one 16-foot machine which his company manufactured and sent to Spain (Tr. 2594–2595). Appellant's Exhibit V shows that the machines used in this contract were 16-foot and 20-foot machines. The expertise of Mr. Provan appears to be in the areas of management and administration. The Board attaches little weight to his testimony that rocky bells and fallouts are two possibilities if the pipe forms are not overfilled and if the interior of the pipe is not rolled (Tr. 2538).

The Government introduced evidence in the form of charts derived from inspection records which show that fallouts and rocky bells occurred at random throughout the period of pipe production and were not bunched in the period when the pipe with flaking and scaling interiors were being produced (Gov. Exhs. 167, 168, 169). Appellant objected to introduction of these exhibits, contending that they used a variety of records which over-emphasized the defects in the early periods and under-emphasized defects in later periods. Appellant declined the opportunity to inspect the original records in order to produce its own summary and is not in a position to criticize the accuracy of the Government's summary of defects. These exhibits are significant, not for the exact numbers of defects, but for the fact that they show that fallouts and rocky bells occurred throughout the pipe production and were not clustered in the period when scaling and flaking interiors were being produced.

Accordingly, the Board finds that the record will not support the conclusion that all rocky bells and fallouts resulted from efforts to avoid making small diameter pipe. The Board further finds that appellant has offered no evidence to enable the Board to find that some specific number, less than the total number of rocky bells and fallouts, resulted from efforts to avoid making small diameters.

In view of appellant's failure to provide record information that additional pipes were wrongfully rejected, the Board, following the ruling of the court, finds the Board's original decision, that 1,013 units were wrongfully rejected, to be correct.

In its previous decision, the Board made a detailed examination of the claim for an equitable adjustment for special hydrotests that were not authorized by the contract. The Board sustained Cen-Vi-Ro's claim for compensation for conducting 283 special hydrostatic tests, but found that all other hydrostatic tests were conducted in accordance with the contract and were not compensable except to the extent that conducting special hydrostatic tests contributed to the disruption allowed for improper rejection of the 1,013 pipe units. Appellant has shown no basis for further equitable adjustment based on special hydrotests.

Pursuant to the court's ruling the Board affirms its earlier decision that appellant is entitled to an equitable adjustment for disruption caused by improper rejection of 1,013 pipe units on May 15, 1965. The Board denies appellant's claim for an increased equitable adjustment for the period May 15 through September 1965, for failure of proof that additional pipe were wrongfully rejected.

II. Disruption Period September 1, 1964, through May 15, 1965.

[2] The finding by the Court of Claims that the Board was in error in its interpretation of the specification relative to permissible diameters noted that the effects of the error on appellant's claim are not clear. Cen-Vi-Ro was allowed to use pipe that accorded with its interpretation of the contract and there were no final rejects for small diameters.

Appellant offered testimony of Mr. Roy Silva, office manager and accountant, who testified that the books and records of Cen-Vi-Ro were not kept in a manner which would enable it to establish its actual costs in support of an equitable adjustment (Tr. 2653–2659). In such case, the court directed the Board to allow appellant to support its claim for an equitable adjustment by other evidence, exclusive of the total cost method, which shows its reasonable costs (Court's Order of Remand, p. 1).

For reasons which it did not disclose, appellant chose not to offer any evidence as to its reasonable costs. Instead, it relied on the formula, used by the Board in the earlier decision to determine the loss of efficiency resulting from wrongful rejection of 1,121 pipes to determine the disruption resulting from wrongful rejection of pipe for small diameters and for other defects which it alleged were the result of its efforts to avoid making small diameter pipe. Appellant claimed an equitable adjustment of $458,478.52, plus 15 percent for indirect costs, if the special hydrotests are not considered, and if hydrotests are considered, $510,842.82 plus 15 percent for a total of $587,469.24 for disruption during the period Sept. 1, 1964, through May 15, 1965.

The difficulties presented by appellant's approach are formidable. In the first instance, the Board was using as a base period the 4½-month period following Oct. 1, 1965, and comparing it with the 4½-month period immediately preceding Oct. 1, 1965, to determine the excess of man-hours in the disruption period over those in the base period. In doing so, the Board assumed that inefficiencies in the disruption period were primarily related to rejection of pipe during the May 15 inventory and observed that such assumption may not have been accurate. For the limited purpose for which it was employed, however, we considered it to be the most appropriate method of determining the equitable adjustment. In the present instance, appellant asks the Board to use the same base period of 4½ months beginning on Oct. 1, 1965, and to compare it with a much earlier 8½-month period that is separated from the base period by 4½ months. There was no event on Sept. 1, 1964, comparable to the May 15, 1965, inventory which resulted in rejection of a large number of pipe, some wrongfully. As enumerated by the court on page 4 of the trial judge's opinion, appellant had a number of production difficulties unrelated to the rejection of pipe for small diameters.

In view of these difficulties, we are unable to assume that all inefficiencies in the disruption period were the result of rejection of pipe.

Appellant's Exhibit Z shows that the number of man-hours per ton of pipe production dropped steadily in September and October from a peak in August 1964. After the extent of the small diameter problem became apparent in October, the number of man-hours per ton of pipe production climbed back almost to the high level of August and remained high for the remainder of the period until May 15, 1965. The Government objected to appellant's labeling of the excess man-hours as disruption (Tr. 2638). The label is not inflammatory, it is merely incomplete since it does not identify the cause of the disruption. The evidence of record does not support Cen-Vi-Ro's conclusion that all of its inefficiencies were the result of disruption of its operation by the Government. On the contrary, as the Board found in its earlier decision and the court agreed, Cen-Vi-Ro experienced many difficulties during this period, including cage manufacturing problems, gyro area concrete which was unconsolidated, longitudinal and circumferential cracks, unconsolidated concrete in bell and spigot areas, fallouts, rocky bells, as well as the small diameters and an undetermined percentage of scaling and flaking interiors caused by efforts to avoid the manufacture of small diameter pipe. The Board's earlier decision found that Cen-Vi-Ro is responsible for a substantial portion of the cost overruns and the court stated that such conclusion was not refuted by appellant's evidence. Appellant introduced no new evidence in this area, so the Board's task is to attempt to determine the impact of the erroneous rejection of small diameter pipe and other damage which may reasonably be attributed to appellant's efforts to avoid making small diameter pipe.

As indicated above, there are too many variables and too many elements of the excess costs that are the responsibility of Cen-Vi-Ro to allow a simple comparison of the man-hours in the base period with the man-hours required for production in the disruption period. While it is clear that the Government's erroneous rejection of pipe for small diameters and appellant's subsequent efforts to avoid making such pipe caused disruption to some degree, the full extent of the disruption caused by the Government is essentially unknown and unknowable on the basis of the record. To attempt to devise a formula for the disruption based on assumptions, which are then intermingled with known figures in a calculation, would lend an inappropriate aura of precision to what is in reality a process of estimating similar to a jury verdict.

Taking into consideration that the Government's misinterpretation of the small diameter tolerances was one cause in the sequence that led to rejections for flaking and scaling but that there were other causes of bad interiors not attributable to the Government, that appellant failed to submit probative evidence that fallouts and rocky bells were directly related to reasonable efforts to correct the small diameter problem, that improper special hydrotests caused some disruption and that there were no final rejects for small diameters, the Board finds, in the nature of a jury verdict, that appellant is entitled to an equitable adjustment of $262,500. This amount includes an allowance for indirect costs. No allowance is made for profit in view of the "extras" clause included in the contract, as the Board found in its earlier decision. The question of interest will be discussed in a later section of this opinion, below.

III. Cost of Rejected Pipe

As in the two previous sections of its claim, appellant has stated its claim in the broadest possible terms, claiming an equitable adjustment of $201,154.33 for direct and indirect costs of all pipe finally rejected for fallouts, rocky bells, and scaling and bad interiors. Appellant has again alleged, without any probative evidence to support its allegation, that all of the above defects flowed from its efforts to avoid making small diameter pipe.

In view of the finding of fact in Section I of the appellant's claim that appellant failed to come forward with sufficient probative evidence to show that rocky bells and fallouts were caused by its efforts to avoid small diameters, the Board denies the portion of this claim that relates to fallouts and rock bells.

Appellant has also claimed an equitable adjustment for all pipe finally rejected for scaling and bad interiors, a total of 332 pipes. Although we consider ourselves bound by the Board's previous finding that efforts to avoid small diameters were a primary cause of the production of pipe with flaking and scaling interiors, that finding did not mean that all flaking and scaling was caused by such efforts. The court pointed out that the Government's misinterpretation of the small diameter tolerances was one cause in the sequence that led to rejections for flaking and scaling but there were other causes of bad interiors such as cracking which were unrelated to the small diameter problem. In connection with this claim appellant has made no attempt to identify and segregate the bad interiors caused by the small diameter problem from the bad interiors resulting from other causes. Although it appears that some of the final rejects were the result of efforts to avoid small diameters, the precise number cannot be determined on the basis of the present record. Accordingly, the Board finds, in the nature of a jury verdict, that appellant is entitled to an equitable adjustment of $43,600 for the direct and indirect costs of the rejected pipe caused by the Government's imposition of overly strict tolerances for measuring inside diameters.

IV. A. Cost of Substituted Pipe

Appellant submitted a claim of $17,554.91 for the difference in cost between larger diameter pipe substituted for smaller size pipe as a result of the Government's erroneous application of small diameter tolerances. Appellant alleges that 324 pieces of larger pipe were substituted, based on the Government's authorization of the substitution by letter of Nov. 23, 1964 (Exh. 5–D). Appellant's claim fails to take into account the closing down of the pipe laying operation on Nov. 21, 1964, and the relaxation of the small diameter tolerances when pipe laying was resumed on May 10, 1965.

Government Exhibit 165 shows that the "as built" drawings, prepared by the Government after completion of the construction, identify only five 66-inch pipe substituted for 60-inch pipe and 160 60-inch pipe substituted for 54-inch pipe.

The Board's previous finding that 1,000 small diameter pipe were authorized for substitution was not a finding as to the number actually substituted. The Board now finds that only 165 pipe were substituted and that all others were laid in accordance with their nominal diameters. The Board further finds that five 66-inch pipe were substituted for 60-inch pipe and that 160 60-inch pipe were substituted for

54-inch pipe. Based on appellant's production reports (Exhs. V–1 and V–2) the Board finds that the 66-inch pipe weighed 15.463 tons per piece while the 60-inch pipe for which it was substituted weighed 12.544 tons per piece for 20-foot length pipe.

The 60-inch pipe substituted for 54-inch pipe came in 16-foot lengths and weighed 10.035 tons and 8.211 tons, respectively.

The Board finds that appellant is entitled to an equitable adjustment for the cost of the extra weight of the substituted pipe computed as follows:

(15.463–12.544) x 5 =
14.595 excess tons of 66-inch pipe
(10.035– 8.211) x 160 =
291.84 excess tons of 60-inch pipe
Total excess tons = 306.435

The Board had previously found the cost per ton for the pipe was $21.97. This figure multiplied by 306.435 excess tons equals $6,732.37 for the direct cost of substituted pipe. Adding 15 percent for indirect costs brings the total equitable adjustment to $7,742.22 for substituted pipe.

IV. B. Responsibility for Delay of Pipe Laying Subcontractor

[3] On page 26 of the trial judge's decision, the Board is directed to make a specific finding as to whether, if the pipes rejected for small diameters or marked as special hydros had been available for use on Nov. 21, 1964, the supply of acceptable pipe would have been sufficient to permit pipe laying operations to continue.

Appellant alleged that an average of 18,986 linear feet of pipe per month was required to keep the pipe laying subcontractor supplied. Appellant's Exhibit Y, based on the assumption that 5,000 feet per week would be laid, purports to show that if pipe rejected for small diameters or marked for special hydros had been available, Cen-Vi-Ro could have met the average requirement for pipe laying. Appellant's use of average figures obscures the fact that its construction schedule did not allow the furnishing of an average number of average sized pipe each month. Appellant's construction schedule called for a specific number of linear feet of specific sizes of pipe at specific times (Govt. Exh. 77).

Government Exhibit 179 sets forth the cumulative monthly totals for scheduled production, actual production, scheduled construction, actual construction, the amount of pipe accepted for shipment, and the small diameters not accepted for shipment. At the end of November 1964 Cen-Vi-Ro had produced 1,560 linear feet of 72-inch pipe and 800 linear feet had been rejected for small diameters. No construction of this size pipe had been scheduled, so rejection of the small diameters in this size had no effect on the pipe laying operation. Production of 66-inch "B" wall pipe had reached 600 linear feet at the end of November and 440 linear feet had been rejected for small diameters. Scheduled construction was 2,200 linear feet, however, and even if all pipe produced had been accepted, there would have been a shortage of 1,600 linear feet of this type of pipe.

Production of 66-inch "A" wall pipe was the area of the greatest difficulty. At the end of November only 15,720 linear feet had been produced while the scheduled construction was 57,720 linear feet. Rejection of 3,500 linear feet of pipe for small diameters was not a significant factor in Cen-Vi-Ro's inability to produce pipe to meet the construction schedule for laying pipe of this size.

Production of 60-inch pipe had reached a total of 10,704 linear feet by the end of November, while scheduled construction was only 5,143 linear feet. None of the pipe had been accepted for shipment for a variety of defects, so even the availability of the 2,304 linear feet of pipe rejected for small diameters would not have enabled Cen-Vi-Ro to maintain the pipe laying schedule for this size of pipe.

For 54-inch pipe, Cen-Vi-Ro had achieved a total production of 40,128 linear feet by the end of November, of which a total of 11,664 linear feet had been rejected for small diameters. No pipe laying for this size was scheduled until March 1965 in the original construction schedule, but apparently because of lack of other sizes of pipe the March construction was moved forward to October and continued until pipe laying operations were suspended.

Based on the foregoing, the Board finds that even if all the pipes rejected for small diameters or marked as special hydros had been available on Nov. 21, 1964, the supply of acceptable pipe would have been insufficient to permit pipe laying operations to continue in accordance with appellant's construction schedule. In the absence of any evidence of record, we decline to speculate whether further adjustments to the construction schedule, such as moving up the laying of 54-inch pipe, could have been made in order to sustain some level of construction.

Cen-Vi-Ro's argument, based on the pipe production shown in Appellant's Exhibit V-1, is that total production for the weeks ending Nov. 29, 1964, through Jan. 31, 1965, exceeded the average weekly amount of pipe necessary to sustain construction. This argument assumes, without citing any evidence, that all of the pipe produced would have been available for laying if the Government had not imposed its overly strict tolerances on small diameters. The argument ignores the requirement for specific sizes of pipe, in specific linear quantities, and at specific times in order to maintain the construction schedule.

The Board finds that pipe laying was shut down on Nov. 21, 1964, because of an overall shortage of acceptable pipe, particularly of the 66-inch "A" wall variety. The Board further finds that the shutdown was not a result of the Government's erroneous rejection of pipe for small diameters. Accordingly, the Board denies Cen-Vi-Ro's claim for reimbursement for the $100.000 payment made to settle the delay claim of

R. H. Fulton, the pipe laying subcontractor.

IV. C. Cost of Land Rented for Pipe Storage

Appellant has claimed $18,000 for the actual cost of leasing 17 acres of land for pipe storage for a period of 3 years beginning on Feb. 3, 1965, and ending Feb. 2, 1968. Appellant attributed the necessity for leasing 17 acres to the need to accommodate erroneously rejected pipe.

Appellant's production-construction schedule (Exh. 77) shows that for every size and type of pipe, the maximum scheduled monthly construction greatly exceeded the maximum scheduled monthly production and extensive stockpiling was planned. For example, out of a total of 83,840 linear feet of 54-inch pipe scheduled to be produced, appellant's original schedule called for 75,504 linear feet to be produced and in storage before the construction began. For 72-inch pipe, production of 20,384 linear feet was scheduled over a period of 12 months before any construction was scheduled. There is no evidence of record to show that appellant could have stored the amounts of pipe planned for inventory without making arrangements such as the lease of the 17 acres in question here.

The additional burden placed on storage facilities by the shutdown of pipe laying operations on Nov. 21, 1964, was not a result of any Government action in view of our finding, above, that the availability of small diameter pipe and pipe designated for special hydros would not have enabled appellant to meet its construction schedule. The claim for the cost of land rented for pipe storage is denied.

IV. D. Costs Due to Reduction of the Lot Test Period

Appellant claimed costs resulting from a decrease in the lot test period from 1 work week to 3 days. In its previous decision, the Board found that there were 377 lot tests on 345 lots of 16-foot pipe, an excess of 32 lot tests, and appellant now claims that the 32 additional tests resulted from the Government's imposition of the strict inside diameter tolerances. For the 20-foot pipe, the Board made no finding as to the number of tests in excess of the contract requirements. Appellant now estimates that 56 excess tests were conducted due to the reduction of the lot test period.

The Board found that 5 man-hours were required for each hydrotest at a cost of $2.84 per man-hour. Appellant claims $1,224.96 for the costs involved in the increased number of tests due to the reduction of the test period (88 x 5 x $2.784).

As indicated above in our discussion of the disruption claim for the period Sept. 1, 1964, to May 15, 1965, the use of unsupported figures or theoretical figures, intermingled with and multiplied by actual costs or average manpower figures, lends a false aura of certainty to a process of calculation which is really an estimation process. In this instance, the facts lend themselves more to the jury verdict approach. Appellant has simply assumed that the reduction in the lot test period flowed directly from the efforts to avoid small diameters.

Appellant's approach ignores the statement on page 4 of the trial judge's opinion, which notes that Cen-Vi-Ro had a number of production difficulties in addition to small diameters. While it is apparent that some of appellant's difficulties resulted from efforts to avoid small diameters, it cannot be assumed, in the absence of evidence of record, that all of the difficulties encountered by appellant resulted from this one cause.

Accordingly, the Board finds in the nature of a jury verdict that appellant is entitled to an equitable adjustment of $850 for the increased costs of lot testing due to the unwarranted reduction of the lot test period. The equitable adjustment includes an allowance for indirect job costs.

V. Interest on Borrowed Money as Cost of Work

[4] Appellant claimed interest for the cost of borrowing money to perform the extra work caused by the Government's actions. In its earlier decision, the Board denied the claim for interest since appellant had not shown that interest was incurred specifically to fund a change.

Appellant has renewed its claim for interest, citing *Bell* v. *United States*, 186 Ct. Cl. 189 (1968). In that case, however, the court stated that the contractor was entitled to recover only the actual interest paid on borrowings necessitated by the change.

In *Framlau Corp.* v. *United States*, 215 Ct. Cl. 185, 196–99 (1977), the court reaffirmed *Bell*, above, but held that a board of contract appeals could only award interest costs as a part of an equitable adjustment for changed work where a contractor actually paid the interest and could prove that the borrowing was forced or otherwise made necessary by the changed work. The evidence offered by appellant shows that all funds used to perform the two contracts in question, except for an initial capital of $1,000, was borrowed from the parent company, Raymond International, Inc., and has not been repaid (Tr. 2613, 2676–77, 2682). Appellant had a net deficit of over $3,578,000 and remains in this position (Tr. 2684).

In a more recent case, *Dravo Corp.* v. *United States*, 594 F.2d 842 (Ct. Cl. 1979), the Court of Claims rejected a line of cases decided by the Armed Services Board of Contract Appeals which allowed interest on nonspecific borrowings or imputed interest for the use of equity capital. The court repeated its position that it requires that a clear necessity for borrowings occasioned by the change be proven and a mere showing of a history of business borrowings and a course of dealings with various banks during the time frame at issue is insufficient to prove a claim for interest.

This Board has not followed the line of cases represented by *Ingalls Shipbuilding Division, Litton Systems, Inc.*, ASBCA No. 17579, Feb. 17, 1978, 78–1 BCA par. 13038, cited by appellant in support of its interest claim. This matter is before the Board on remand, and the Board will follow the Court of Claims.

Since appellant proved only a general course of borrowing from the parent corporation and has made no showing that any specific borrowing was the result of a change in the contract, the claim for interest is denied.

Summary

The Board reaffirms the amounts allowed in its original decision, $218,180.83 under DC-6000 and $5,348.95 under DC-6130. In addition, on reconsideration of the equitable adjustment in accordance with the decision of the Court of Claims, the Board has made the following allowances:

For disruption from September 1, 1964, to May 15, 1965:	$262, 500. 00
Cost of rejected pipe	43, 600. 00
Cost of substituted pipe	7, 742. 22
Costs due to reduction of lot test period	850. 00
Total	314, 692. 22

The remainder of appellant's revised claim for $1,302,215.67 is denied. Appellant's claim for interest is denied.

G. Herbert Packwood
Administrative Judge

We concur:

William F. McGraw
Chief Administrative Judge

Russell C. Lynch
Administrative Judge

WILSON FARMS COAL CO.

2 IBSMA 118

Decided *June 27, 1980*

Appeal by Wilson Farms Coal Co. from a Feb. 8, 1980, decision by Administrative Law Judge David Torbett sustaining Notice of Violation No. 79-II-5-21 in Docket No. NX 9-88-R.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Permittees

A permittee is a proper party to be issued a notice of violation under the Act and a lease agreement between a permittee and a private party cannot relieve the permittee from its responsibilities under the Act.

APPEARANCES: Ted Q. Wilson, Esq., Oneida, Tennessee, for Wilson Farms Coal Co.; Mark Squillace, Esq., and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE BOARD OF SURFACE MINING AND RECLAMATION APPEALS

Wilson Farms Coal Co. (Wilson Farms) has appealed from a Feb. 8, 1980, decision of Administrative Law Judge David Torbett sustaining Notice of Violation No. 79-II-5-21.[1] Judge Torbett concluded that Wilson Farms was the proper party to be issued the notice. For the reasons stated below, we affirm that decision.

---

[1] The notice charged three violations:
Violation No. 1—Failure to transport, backfill, compact and grade all spoil material to eliminate all highwalls, spoilpiles and depres-

(Continued)

Factual and Procedural Background

On June 19, 1979, pursuant to the Surface Mining Control and Reclamation Act of 1977 (Act),[2] an Office of Surface Mining Reclamation and Enforcement (OSM) inspector visited the Black Oak Mine in McCreary County, Kentucky, and the next day issued Notice of Violation No. 79-II-5-21 to Wilson Farms. Wilson Farms sought review of the notice and Judge Torbett held a hearing on Oct. 12, and Nov. 19, 1979. Following issuance of the decision on Feb. 8, 1980, Wilson Farms appealed to the Board.

Ted Q. Wilson and his wife own the land where the alleged violations occurred (Oct. Tr. 48).[3] Kentucky State Permit No. 2333-72 was issued to "Wilson Farms Coal Company" on Dec. 12, 1972. The permit covered 24 acres. In June 1973 a supplemental permit (No. 2333-72S#1) added 100 acres to the Wilson Farms permit (Exh. R-5). Subsequently, a renewed permit (No. 2333-72R) was issued to "Wilson Farms Coal" covering 90 acres of Permit Nos. 2333-72 and 2333-72S#1 (Exh. R-10 and R-11).

On June 3, 1977, Ted Q. Wilson and his wife leased certain properties to Kitov Corp. (Exh. R-6) which assigned the lease to Shannon Coal Corp. on Nov. 30, 1977 (Exh. R-7). Ted Q. Wilson testified that the land in question was covered by this lease (Oct. Tr. 48).

When the surface mining law went into effect, Kentucky computerized its records and assigned new numbers to existing permits (Nov. Tr. 19). Permit No. 2333-72S#1 apparently became Permit No. 274-0011 (Exh. R-133). By letter dated May 23, 1979, the Kentucky Department of Natural Resources and Environmental Protection (DNREP) informed "Wilson Farms Coal Company, c/o Ted Wilson" that it was enclosing a settlement order for signature and payment of a $2,000 civil penalty with respect to Permit No. "274-0011 (2333-72S#1)" (Exh. R-14). The settlement and penalty related to a "Noncompliance" dated Feb. 13, 1979 (Exh. R-7-1). By letter dated July 17, 1979, Ted Q. Wilson forwarded the signed settlement agreement and a $2,000 check to the Commonwealth. The Kentucky violation and the OSM violations involved the same area (Oct. Tr. 9, 59).

Discussion

Appellant does not contest the fact of the violations. It seeks rather to avoid responsibility under

---

(Continued)

sions in order to achieve approximate original contour in violation of 30 CFR 715.14.

Violation No. 2—Spoil, waste materials, and debris have been placed or allowed to remain on the downslope in violation of 30 CFR 716.2(a).

Violation No. 3—Failure to segregate and stockpile topsoil adequately in violation of 30 CFR 715.16.

[2] Act of Aug. 3, 1977, 91 Stat. 445, 30 U.S.C. §§ 1201-1328 (Supp. I 1977).

[3] Oct. Tr. refers to the Oct. 12, 1979, hearing transcript and Nov. Tr. to the Nov. 19, 1979, hearing transcript.

the Act. Ted Q. Wilson argues that he is not affiliated with Wilson Farms Coal, Wilson Farms Coal Co. or Wilson Farms Coal Co., Inc. However, the evidence amply supports the Administrative Law Judge's finding that Wilson Farms, Wilson Farms Coal, Wilson Farms Coal Co., and Wilson Farms Coal Co., Inc., were the same legal entity (a partnership of Ted Q. Wilson and his wife) from Dec. 12, 1972, to Oct. 11, 1979. We see no reason to disturb that finding.

Appellant's principal argument on appeal is that it is not responsible for the violations because the land in question was leased to Kitov Corp. Appellant states that under the lease the lessee agreed to assume all obligations and responsibilities of the lessors, including compliance with all present and future state and Federal laws. Appellant reasons that the lease relieved it from liability under the Act.

[1] OSM issued the notice of violation to Wilson Farms pursuant to § 521(a)(3) of the Act.[4] That section provides for the issuance of notices of violation to permittees. Therefore, a permittee is a proper party to be issued a notice of violation. In this case the permittee was at all times Wilson Farms. Wilson Farms never assigned a permit; Ted Q. Wilson and his wife merely entered into a lease. Whatever relief may be available to Ted Q. Wilson as a result of the arrangement, Wilson Farms cannot be relieved of its obligations as a permittee under the Act by virtue of the lease to Kitov Corp.[5]

In addition, at the same time that the lease was in effect, Ted Q. Wilson entered into a settlement agreement and paid a $2,000 civil penalty to the Commonwealth of Kentucky for violations of the Kentucky surface mining law on the same lands. This action was clearly contradictory to the assertion that Wilson Farms had transferred its obligations to the lessee under the lease.

Wilson Farms also argues that it was in an untenable position because of conflicting directions from Kentucky and OSM officials. Ted Q. Wilson testified that Kentucky instructed him on May 15, 1979, not to take "any action on this permit" until it approved a proposed silt control plan (Oct. Tr. 53; Exh. R-7-1). The plan was not approved until Aug. 17, 1979 (Oct. Tr. 53). During the intervening period, OSM issued the notice of violation on June 20, 1979. The apparent thrust of this argument is that the notice should not have been issued because nothing could be done to correct the violations. However, Ted Q. Wilson's letter to the Kentucky DNREP dated July 17, 1979, indicates that reclamation work was being undertaken on this area and, therefore, clearly "any action" on the permit was not forbidden.

---

[4] Sec. 521(a)(3) (30 U.S.C. § 1271(a)(3) (Supp. I 1977)) reads in pertinent part:

"When, on the basis of a Federal inspection which is carried out * * * pursuant to section 502, * * * the Secretary or his authorized representative determines that any *permittee* is in violation of any requirement of this Act * * * the Secretary or authorized representative shall issue a notice to the *permittee or his agent* fixing a reasonable time * * * for the abatement of the violation." (Italics added.)

[5] In response to comments received by OSM concerning the assignment of points for negligence in the assessment of civil penalties during the interim program, the following explanation was made in the preamble to the interim program regulations:

"Comments were received suggesting that the attribution to the permittee of the actions of all persons working on the mine site was improper. They were rejected. The Act, and indeed State laws, makes the permittee liable for the conduct of the mining and compliance with the law. Anyone working on the mine is there for the benefit of or at the sufferance of the permittee. To excuse the permittee from violations resulting from activity of such people would undermine the permittee's motivation to exercise his control to protect against violations." 42 FR 62671 (Dec. 13, 1977).

Appellant's other arguments have been considered, and we find them to be without merit.[6]

The decision appealed from is affirmed.

WILL A. IRWIN
Chief Administrative Judge

NEWTON FRISHBERG
Administrative Judge

MELVIN J. MIRKIN
Administrative Judge

UNITED STATES v. CATLIN BOHME ET AL.

UNITED STATES v. EXXON CORP. ET AL.

UNITED STATES v. AIDABELLE BROWN ET AL.

48 IBLA 267

Decided *June 30, 1980*

Cross appeals of Administrative Law Judge Harvey C. Sweitzer's decision dismissing a Government contest to various oil shale placer mining claims and declaring others null and void. Colorado Contest Nos. 658, 659 and 660. On remand from the United States District Court for the District of Colorado.

Affirmed in part, reversed in part.

1. Administrative Procedure: Burden of Proof—Contests and Protests: Gen-

---

[6] Appellant argues further that the notice should be vacated because the Secretary of the Interior failed to notify the State regulatory authority as required by sec. 521(a)(1) of the Act (30 U.S.C. § 1271(a)(1) (Supp. I 1977)). As we stated in *Dayton Mining Co., Inc., & Plateau, Inc.*, 1 IBSMA 125, 86 I.D. 241 (1979), the Secretary has interpreted the Act through the interim regulations to exclude sec. 521(a)(1) from having effect during the interim regulatory program. The same conclusion was reached in *Union Carbide Corp.* v. *Andrus*, 9 ELR 20701 (S.D.W.Va. 1979).

Appellant directs our attention to *Virginia Surface Mining & Reclamation Ass'n, Inc.* v. *Andrus*, 483 F. Supp. 425 (W.D.Va. 1980), and asserts that the permanent injunction in that case should foreclose OSM enforcement in this case. But this case arose in Kentucky, not Virginia, and in any event the Virginia injunction has been stayed by the U.S. Supreme Court. *Andrus* v. *Virginia Surface Mining & Reclamation Ass'n*, 48 U.S.L.W. 3601 (Mar. 18, 1980).

Appellant claims that the Act does not apply to its activities because it was affecting 2 acres or less and sec. 528(2) (30 U.S.C. § 1278(2) (Supp. I 1977)) exempts such activity from coverage by the Act. This assertion is not supported by the record, however. The OSM inspector testified that more than 2 acres had been disturbed (Oct. Tr. 14), and specifically indicated that more than 2 acres had been disturbed after May 3, 1978 (Oct.

(Continued)

(Continued)

Tr. 45). Appellant made no attempt to rebut this testimony.

The last argument made by appellant is that the OSM enforcement action constituted "double jeopardy" in that appellant had paid a $2,000 civil penalty as a result of Kentucky enforcement action on the same surface coal mining operation. The double jeopardy clause only applies in the criminal context; such a prohibition is not applicable to a civil action. *See Breed* v. *Jones*, 421 U.S. 519, 528 (1975). Furthermore, the violations cited by the Commonwealth of Kentucky were totally unrelated to those contained in the OSM notice (Exh. R-7-1; Exh. R-3).

erally—Evidence: Prima Facie Case—Mining Claims: Contests—Rules of Practice: Appeals: Burden of Proof—Rules of Practice: Government Contests

The assertion that annual assessment work has not been performed is the assertion of a negative fact. If an examination of the mining claims and the nearby lands does not reveal the accomplishment of the required work, and there is no record of any such work having been performed, then evidence to this effect would be sufficient to establish a prima facie case. It would then devolve upon the claimant to show by a preponderance of countervailing evidence that he has substantially complied with the statute.

2. Administrative Procedure: Burden of Proof—Contests and Protests: Generally—Evidence: Burden of Proof—Mining Claims: Contests—Mining Claims: Determination of Validity—Rules of Practice: Appeals: Burden of Proof—Rules of Practice: Government Contests

In a Government contest proceeding to determine the validity of a mining claim, the claimant is always the proponent of the rule or order, always the one claiming to have earned the benefit of the mining laws through his compliance therewith. Regardless of whether the issue on which the validity of the claim rests is discovery, mode of location, or performance of assessment work, the relative position and obligation of the contestant and the contestee remain the same.

3. Administrative Procedure: Adjudication—Contests and Protests: Generally—Mining Claims: Assessment Work — Mining Claims: Contests—Mining Claims: Determination of Validity—Rules of Practice: Government Contests

Where the Government contests the validity of a mining claim for nonperformance of annual assessment work, there is nothing inherent or implied in that action which requires a conclusion that the claim is valid in all other respects, nor may the bringing of such an action be treated as tantamount to an admission by the Government that "property rights in the claim have been established by the making of a valid location."

4. Mineral Leasing Act: Generally—Mining Claims: Abandonment—Mining Claims: Assessment Work—Stare Decisis

Failure to maintain a claim by doing assessment work each year may constitute evidence of abandonment. Independently, a failure to substantially comply with the requirement that annual assessment work be performed, 30 U.S.C. § 28 (1976), requires a finding that the claim has not been "maintained" within the meaning of sec. 37 of the Mineral Leasing Act, 30 U.S.C. § 193 (1976), and may result in a forfetiture of the claim. *Hickel* v. *The Oil Shale Corp.*, 400 U.S. 48 (1970).

5. Equitable Adjudication: Generally—Estoppel

No decision of any Federal court, or any formal decision or Instruction issued by the Department of the Interior has ever purported to hold that a mining claimant is not required under 30 U.S.C. § 28 (1976) to perform annual assessment work. Relevant court decisions deal not with the question whether oil shale claimants are required to comply with the provisions of sec. 28, but whether the United States is a beneficiary of a failure to perform the assessment work, and such decisions expressly note that a mining claimant is required to perform labor of $100 annually for each claim.

6. Equitable Adjudication: Generally—Laches

The defense of laches is not available against the Government in cases involving public lands. Even were laches determined to be an available defense, it would clearly be circumscribed by the same limitations surrounding the doctrine of estoppel.

APPEARANCES: David G. Manter, Esq., Denver, Colorado, Neil S. Mincer, Esq., Glenwood Springs, Colorado, for appellants in Contest No. 658; Warren O. Martin Esq., Denver, Colorado, for appellants in Contest No. 659; H. Michael Spence, Esq., Denver, Colorado, Fowler Hamilton, Esq., and Richard W. Hulbert, Esq., New York, N.Y., and Donald L. Morgan, Esq., Washington, D.C., for appellants in Contest No. 660. Lyle K. Rising, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Government.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

INTERIOR BOARD OF LAND APPEALS

The above-captioned cases are before the Interior Board of Land Appeals on cross-appeals of the decision of Administrative Law Judge Harvey C. Sweitzer, dated July 17, 1979, dismissing contests against various oil shale placer mining claims and declaring others null and void for failure to substantially comply with the requirement that annual assessment work in the amount of $100 be performed for the benefit of each claim, 30 U.S.C. § 28 (1976).

Because of the lengthy history of these cases in the Department and in the courts, we will depart somewhat from the usual practice of setting forth the events immediately culminating in the decision from which the appeals are prosecuted. After identifying the parties and other preliminary matters, therefore, we shall reach and review Judge Sweitzer's decision as the chronology of these cases dictates.

I. INTRODUCTION

CONTEST 658—Mineral Patent Application C-028751

Contestees are: Cameron Catlin Bohme; St. Clair Napier Catlin; John R. Farnum, Jr.; Elizabeth Young Farnum Hinds; James M. Larson; Jean M. Larson; Rachael Magnall; Neil S. Mincer; Barnette T. Napier; Barnette T. Napier, Jr.; Grace A. Savage; Joan L. Savage; and John W. Savage. Contestees hold possessory title to the Northwest, Northeast, Southwest, and Southeast oil shale placer mining claims, all originally located on July 2, 1918. Those claims are collectively referred to as the Compass Group, an appellation we will also use. The claims are situated in sec. 27, T. 7 S., R. 98 W., sixth principal meridian, Garfield County, Colorado.[1]

On June 1, 1959, contestees or their predecessors in interest filed patent application for the Compass Group. Final certificate issued on Aug. 16, 1961.

---

[1] The Compass claims are situated in W ½ E ½ NE ¼, W ½ NE ¼, N ½ NW ¼, SW ¼ NW ¼, NW ¼ SW ¼, S ½ SW ¼, SE ¼.

CONTEST 659—Mineral Patent Application C–030979

Contestees are Exxon Corp. (Exxon), a New Jersey corporation; Joseph B. Umpleby; Wasatch Development Co. (Wasatch), a Colorado corporation; and Dixie Wittstruck as trustee under the will of R. E. Magor, Jr., deceased. Contestees hold possessory title to the Elizabeth Nos. 1, 2, and 4 through 12, located on May 18, 1918, and the Carbon Nos. 1 through 4, located on Apr. 10, 1918. These claims are situated in N ¼ sec. 32, secs. 33 through 36, T. 4 S., R. 97 W., sixth principal meridian, Garfield County, Colorado.[2]

On Sept. 8, 1959, contestees or or their predecessors in interest applied for patent of the subject claims with the exception of Elizabeth No. 3. No final certificate has been issued.

CONTEST 660—Mineral Patent Application C–012327

Contestees are: Aidabelle Brown, individually and as personal representatives of the Estate of Harry Donald Brown; Penelope Chase Brown Ulrey, individually and as trustee for the Estate of Harry and Penelope Chase Brown; and The Oil Shale Corp. (TOSCO), a Nevada corporation, as lessee. Pacific Oil of California (Pacific) appears as a named contestee. In 1964, however, Pacific Oil reconveyed title to contestees or their predecessors in interest. It therefore appears that Pacific Oil is no longer a proper party to this litigation; it is at best a nominal party.

Contestees hold possessory title to the Oyler Nos. 1 through 4 oil shale claims, originally located on Sept. 25, 1916. These claims are situated in secs. 10, 11, 12, T. 6 S., R. 95 W., sixth principal meridian, Garfield County, Colorado,[3] within the exterior boundaries of the Naval Oil Shale Reserve No. 1,[4] Colorado No. 1.

In September 1955, application for patent was filed by Pacific Oil of California, then possessory owner of the Oyler claims. Final certificate issued on Aug. 28, 1956.

All of the mining claims involved in these three contests were, by decisions of various dates in 1931, declared null and void on the ground, *inter alia*, of failure to comply with the assessment work requirements of the general mining laws, specifically 30 U.S.C. § 28 (1976). The import and general effect of these decisions and subsequent Departmental actions relating to these claims will be delineated *infra*.

For the purposes of clarity and convenience, we shall refer to the several groups of contestees by contest number, or by the first name leading those of the other contestees in the caption of each appeal.

---

[2] Specifically, the Elizabeth and Carbon claims are situated in N ½ N ½ sec. 32, and secs. 33 through 36 in their entirety. Portions of the surface and mineral estates have been patented and are not here involved.

[3] The Oyler claims are situated in sec. 10, lots 1 and 4, E ½ NE ¼ (NE ¼); sec. 11, N ½, N ½ SW ¼; and sec. 12, W ½ NW ¼.

[4] Created by Executive Order, dated Dec. 6, 1916.

Thus, unless otherwise indicated, references to Bohme, Exxon, or Brown, shall be understood to designate the entire group of contestees in each appeal.

It is also noted that our references to assessment years[5] will name the concluding year in which assessment work was due. Thus, reference to the year 1929, for example, denominates the assessment work year *ending* June 30, 1929.

II. HISTORY

Prior to 1920, oil shale was a locatable and patentable mineral under the Mining Law of 1872, May 10, 1872, 17 Stat. 91, 30 U.S.C. § 22 *et seq.* (1976). Sec. 28 thereof provides:

> On each claim located after the 10th of May 1872, and until a patent has been issued therefor, not less than $100 worth of labor shall be performed or improvements made during each year. On all claims located prior to the 10th day of May 1872, $10 worth of labor shall be performed or improvements made each year, for each one hundred feet in length along the vein until a patent has been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location.

In 1899, the Secretary of the Interior held, in *P. Wolenberg*, 29 L.D. 302, 304 (1899):

> The annual expenditure of one hundred dollars, in labor or improvements, * * * is solely a matter between rival or adverse claimants to the same mineral land, and goes only to the right of possession, the determination of which is committed to the courts and not to the land department [*citing Hughes* v. *Ochsner*, 27 L.D. 396 (1898), and *Opie* v. *Auburn Gold and Mining Co.*, 29 L.D. 230 (1899)].

Congress enacted the Mineral Lands Leasing Act (Leasing Act), Feb. 25, 1920, 41 Stat. 437, 30 U.S.C. § 181 *et seq.* (1976). That Act withdrew oil shale, among other minerals, from the operation of the mining law, and provided that thereafter these minerals were available for development by leasing only. The Act contains a savings clause, sec. 37, 41 Stat. 451, which provides, in material part, that: "[A]s to valid claims existent at the date of the passage of this Act and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery."

Subsequent to the enactment of the Leasing Act, *supra*, the Secretary held in *Emil L. Krushnic*, 52 L.D. 282 (1927), *aff'd on rehearing*, 52 L.D. 295 (1928), that performance of annual assessment work on claims located for oil shale was a prerequisite to maintaining the claims in compliance with the laws under which they were initiated, as required by sec. 37 of the Leasing Act (commonly referred to as the "savings clause"). Thus, a failure to perform assessment work annually terminated a claimant's rights under the mining location. Under this interpretation, hundreds of oil shale claims were declared invalid for failure to comply with the assessment work requirements. Included among these claims were those which are involved in the instant appeals.

---

[5] Prior to 1958, the assessment work year commenced July 1 and ended June 30 of the following year. On Aug. 23, 1958, P.L. 85–736, 72 Stat. 829 (85th Cong. 2d Sess.), changed the commencement of the assessment year to Sept. 1.

In *Wilbur* v. *United States ex rel. Krushnic* (*Krushnic*), 280 U.S. 306 (1930), the Supreme Court considered the effect and meaning of the savings clause with regard to the assessment work requirements of the Mining Law of 1872. Krushnic held possessory title to a claim on which he had defaulted in annual assessment work for the year immediately preceding his application for patent. Final certificate issued before the contest was instituted. The issue presented was whether the Leasing Act of 1920 extinguished the right under the general mining law to preserve a mining claim under the original location by resuming work after a failure to perform annual assessment labor.

The Supreme Court held that:

> While he is required to perform labor of the value of $100 annually, a failure to do so does not *ipso facto* forfeit the claim, but only renders it subject to loss by relocation. And the law is clear that no relocation can be made if work be resumed after default and before such relocation.
>
> Prior to the passage of the Leasing Act, annual performance of labor was not necessary to preserve the possessory right. * * * as against the United States, but only against subsequent relocators. So far as the government was concerned, failure to do assessment work for any year was without effect. Whenever $500 worth of labor in the aggregate had been performed, other requirements aside, the owner became entitled to a patent, even though in some years annual assessment labor had been omitted.
>
> * * * * *
>
> * * * [A]fter failure to do assessment work, the owner equally maintains his claim, within the meaning of the Leasing Act, by a resumption of work, unless at least some form of challenge on behalf of the United States to the valid existence of the claim has intervened. [Italics in original. Citations omitted.]

280 U.S. at 317–18.

On June 17, 1930, following the decision of the Supreme Court in *Krushnic*, *supra*, instructions for adverse proceedings against oil shale claims on the ground of default in assessment work were issued. In these Instructions, 53 I.D. 131, 132 (1930), Secretary Wilbur directed:

> [W]here, as in this case, patent proceedings have been instituted and the requisite expenditure has been made, the applicant has shown compliance with the law in maintaining the claim, no challenge can, at this late date, be made against the claimants because of failure to perform annual labor. Such challenge must be at a time when under the law adverse claimants could assert their rights.
>
> It is clear * * * that the United States, in order to make a lawful challenge to the validity of an oil shale claim for failure to do the annual assessment work in any patent proceedings, must do so at a time when there is an actual default and no resumption of work, and prior to the time the patent proceedings including the publication of notice have been completed.

As a result, it was the Department's official position that it possessed authority to initiate contest proceedings for failure to perform annual assessment work, provided such challenge was instituted during actual default and prior to resumption of the work. Accordingly, the Department proceeded against oil shale claims in appropriate circumstances.

Five years later, *Ickes* v. *Virginia-Colorado Development Corp.* (*Virginia-Colorado*), 295 U.S. 639 (1935), was decided. In that case, the mining claimant had defaulted in assessment work in the year immediately preceding the initiation of the contest proceedings. The Department subsequently declared the claim null and void. The issue presented was whether the mining claimant had the right to retain possession of the claim, as against the United States, and resume work at any time before a valid relocation by another. No relocation could have occurred during the period of default.

The Supreme Court held that the mining claimant was squarely within the savings clause of the Leasing Act:

> Plaintiff had lost no rights by failure to do the annual assessment work; that failure gave the government no ground of forfeiture. [Citing *Krushnic, supra.*] * * * Plaintiff was entitled to resume [work]. * * * Plaintiff's rights after resumption would have been as if "no default had occurred." *Belk* v. *Meagher*, [104 U.S. 279 (1881)] * * *. "Such resumption does not *restore* a *lost* estate * * *; it *preserves* an *existing* estate." [Italics in original.]

295 U.S. at 646.

Thus, *Virginia-Colorado* rejected the Department's interpretation of *Krushnic*, that a default in assessment work subjected a mining claim to governmental challenge during the actual period of default and prior to subsequent resumption of assessment work. In the *Shale Oil Co.*, 55 I.D. 287 (1935), the First Assistant Secretary stated:

> In view of this opinion of the court, the adverse proceedings and decision of the Commissioner therein in the instant case must be held as without authority of law and void. The * * * decision * * * in the *Virginia-Colorado Development Corporation* [53 I.D. 666 (1932)] case and the instruction of June 17, 1930, are hereby recalled and vacated. The * * * decisions in the cases of *Francis D. Weaver* [53 I.D. 175 (1930)] and *Federal Oil Shale Company* [53 I.D. 213 (1930)] *and other Departmental decisions in conflict with this decision are hereby overruled.* [Italics supplied.]

55 I.D. at 290

In the nearly 30 years following *Virginia-Colorado* and the *Shale Oil Co., supra*, the Department was of the official view that default in assessment work was exclusively a matter between rival claimants. That official view was widely disseminated among miners, members of the state and Federal legislatures, and governmental agencies, and the interested public. We believe the administrative record herein, amply supplemented by exhibits adduced by contestees during the trial in district court, admits of no other conclusion regarding the Department's official view that defaults in annual assessment work inured only to the benefit of rival claimants. Many hundreds of oil shale claims had been declared null and void during the 1920's and 1930's on the principal ground of default in performance of annual assessment work. After *Virginia-Colorado* and the *Shale Oil Co., supra*, many of these claims proceeded to patent notwithstanding those early decisions, the Department's view then being that such decisions were invalid for any purpose.

Contestees filed patent applications in 1955 (Contest 660) and 1959 (Contest 658 and 659). Bohme (Contest 658) and Brown (Contest 660) received final certificates. In 1961, however, the Department adopted the position that the pre-1935 administrative contest proceedings barred issuance of patent. Accordingly, contestees' patent applications were denied by decisions dated Feb. 16 and 23, 1962. Contestees appealed to the Director of the Bureau of Land Management, but the Secretary, in exercise of his supervisory jurisdiction, submitted the case to the Solicitor for final decision. That decision, *Union Oil Co. of California*,[6] 71 I.D. 169 (1964), affirmed the Manager's[7] decisions to reject the contestees' patent applications.

In *Union Oil*, the Solicitor recognized that:

> The basis of the Manager's decisions in the present cases was not that the original cancellations were correct as a matter of law at the time they were made, but rather, that "under * * * principles of finality of administrative action, estoppel by adjudication, and *res judicata* * * *," they cannot now be challenged. [Italics in original.]

71 I.D. at 170.

Citing the *Shale Oil Co., supra*, the Solicitor asserted that the language used therein "distinguishes those cases actually before the Secretary from those which are not. As to the former, the Commissioner's decisions canceling the claims were expressly *recalled* and *vacated*. The latter were merely 'overruled' [footnote omitted]." 71 I.D. at 175.

After noting the Department's longstanding practice of giving prospective application to its decisions, the Solicitor concluded that the *Shale Oil Co.* decision "merely recalled and vacated the earlier decision in that particular case '* * * thereby depriving the earlier opinion of all authority as precedent.'" *Id.* at 176. This view was based in large part on the fact that contestees (or their predecessors in interest), with the exception of Brown, failed to appeal the old contest decisions after notice and hearing. *Id.* at 172, n.5. In such circumstances, the Solicitor ruled the earlier decisions must be held conclusive, and "in the absence of a legal or equitable basis warranting reconsideration," such decisions would not be reopened. That the Supreme Court or a court of appeals should subsequently invalidate the legal basis for such decisions was held insufficient to require "reconsideration and reversal of cases finally decided before the change in the interpretation or application of the law" (citations omitted). *Id.* at 177.

---

[6] Supplemental decision, *Union Oil Co. of California*, 72 I.D. 313 (1965).

[7] The duties at that time exercised by the Land Office Manager are now primarily located in the Office of the BLM State Director.

In response to arguments advanced by contestees, the Solicitor also ruled that neither *Krushnic* nor *Virginia-Colorado*, *supra*, denied the Secretary's jurisdiction to challenge the claims in the 1930's; rather, those decisions had merely found error in his interpretation and application of the explicit terms of the statutes relating to the effect of failure to perform annual assessment work. The Solicitor expressly rejected the contention that the United States had consistently recognized the validity of the subject claims during the period 1955 through 1962.

As previously noted, *Union Oil Co.* affirmed the Manager's decisions to reject the patent applications for the instant claims. Contestees therein then sought review of the Solicitor's decision in the District Court for the District of Colorado. *The Oil Shale Corp.* v. *Udall*, 261 F. Supp. 954 (D. Colo. 1966). We think it advisable to set forth at length the issues there presented, as they have recurred throughout this litigation.

First, plaintiffs contended that *Krushnic* and *Virginia-Colorado*, *supra*, stand for the proposition that the Department lacked authority to declare oil shale claims null and void on the ground of failure to perform annual assessment work. Second, plaintiffs challenged the adequacy of notice of the pre-1933 contest proceedings. Third, referring to various pronouncements of the Department's officials and employees between 1935 and 1962, and the patenting of claims previously declared void in circumstances identical to those surrounding the subject claims, plaintiffs argued that such acts constituted a rule of law which could not be retroactively altered by the Department. Thus, they argued that the old contests had no effect on the validity of the claims. Plaintiffs further asserted that they and their predecessors in interest had justifiably relied upon this rule of law.

The *Union Oil* decision, *supra*, was premised upon the assumption, in the view of the district court,

> that the Supreme Court had not denied the Department's jurisdiction with respect to the subject matter. * * * In essence, [the Solicitor] determined that the applicants were required to take action to nullify these rulings at the time and that their failure to exercise this initiative constituted something in the nature of an implied acquiescence.

261 F. Supp. at 965.

The court further noted:

> In supporting of his holding that there was such jurisdiction, the Solicitor pointed to the language in *Virginia-Colorado* to the effect that the Secretary had authority by appropriate proceedings to determine that a claim was invalid for lack of discovery, fraud, or other defect, or that it was subject to cancellation by reason of abandonment. From this he concluded that the Department at all times retained jurisdiction; that is, power over these claims. As we view it, this was an unjustified interpretation of the decisions of the Supreme Court. It overlooked the basic nature in terms of

> property of a mining location. Both *Krushnic* and *Virginia-Colorado* proceeded on a fundamental proposition that this creates a vested property right which can be defeated only by a competitor. Historically, this was the nature and character of the mining claim, and to overlook it is to change a fundamental rule of property.
>
> * * * [A]n adjudication by a tribunal lacking subject matter jurisdiction is wholly nugatory, need not be appealed, and can not be *res judicata*. When, as here, the Department acted beyond the authority granted to it by the law, it acted in the particular area beyond its jurisdiction. * * * It is clear from a reading of * * * [*Virginia-Colorado*] that the Court was speaking on the question of the Department's jurisdiction. As to pre-1920 locations, the Court held that they retained the legal status which they had enjoyed prior to the adoption of the Leasing Act. * * * [*Krushnic* and *Virginia-Colorado*] rule that prior to the adoption of this Act the performance of assessment work was unnecessary to the preservation of the locator's possessory right against the Government.
>
> *Virginia-Colorado* clarified beyond question the proposition that the Government has never had a possessory right to pre-Leasing Act mining claims defective only for failure to perform assessment work. It follows from this that the Department is wholly without jurisdiction to inquire into the status of assessment work performance.

261 F. Supp. at 965–66.

The Court of Appeals for the Tenth Circuit affirmed the district court's judgment of reversal. *Udall v. The Oil Shale Corp.*, 406 F.2d 759 (10th Cir. 1969).

The Supreme Court granted certiorari to consider whether *Krushnic* and *Virginia-Colorado* had been correctly construed and applied. In *Hickel* v. *The Oil Shale Corp.* (*TOSCO*), 400 U.S. 48 (1970), the Court while declining to overrule these cases, limited the holdings therein. Specifically, the Court held:

> [D]icta to the contrary, we conclude that they must be confined to situations where there had been substantial compliance with the assessment work requirements of the 1872 Act, so that the "possessory title" of the claimant. granted by 30 U.S.C. § 26, will not be disturbed on flimsy or insubstantial grounds.
>
> Unlike the claims in *Krushnic* and *Virginia-Colorado*, the Land Commissioner's findings indicate that the present claims had not substantially met the conditions of § 28 respecting assessment work. Therefore we cannot say that *Krushnic* and *Virginia-Colorado* control this litigation. We disagree with the dicta in these opinions that default in doing the assessment work inures only to the benefit of relocators, as we are of the view that § 37 of the 1920 Act makes the United States the beneficiary of all claims invalid for lack of assessment work or otherwise. It follows that the Department of the Interior had, and has, subject matter jurisdiction over contests involving the performance of assessment work.

400 U.S. at 57.

The Court expressly rejected the proposition that enforcement of the assessment work provision derived solely from relocations as relocation was impossible after 1920. The opposite conclusion would mean "that a claim could remain immune from challenge to anyone with or without any assessment work, in complete defiance of the 1872 Act."

400 U. S. at 56.

As to the argument that the *Shale Oil Co., supra*, constituted an administrative rule which nullified the 1930–33 contest proceedings which had held appellees' claims void, and as to the question whether those proceedings, if still valid, were currently reviewable for substantive and procedural errors, the court directed consideration on remand of "all issues relevant to the current validity of those contest proceedings * * * including the availability of judicial review." 400 U.S. at 58.

On remand, in *The Oil Shale Corp.* v. *Morton*, 370 F. Supp. 108 (D. Colo. 1973), the district court treated its task as two-fold: To decide whether the 1930–33 contests are valid and therefore a proper basis for the Manager's decisions to reject contestees' patent applications; and secondly, should the old contests be held nullities, whether the subject claims are presently valid, after all other possible grounds of invalidity have been considered. The issue of procedural defects in the old contest proceedings was reserved pending resolution of the foregoing issues.

In effect, the district court ruled that the Department's statements in the years from 1935 to 1961, in the form of Departmental memoranda, official correspondence and regulations, constituted a rule which "had the force and effect of law to the same extent as though written into the statute." (Citations omitted.) 370 F. Supp. at 122. The court characterized this "legislative rule" as a "procedural rule * * * binding on the Department and this Court under the holding of Service v. Dulles, 354 U.S. 363 (1957)," and concluded that contestees and the mining industry were therefore justified in believing assessment work involved possessory rights and was solely a matter of concern to rival claimants to mineral lands. The court also found that the old contests had been vacated by the *Shale Oil Co., supra*, and therefore constituted no obstacle to patent. Thus, no administrative appeal had been necessary in the view of the court to remove the impediment posed by the old contest decision. *Id.* at 123.

The court further held the Government estopped from denying patents based on the old contest decisions, on the basis of the following acts and statements:

> (1) The Secretary's 1935 holding in *Shale Oil, supra*, which, in response to the ruling in Ickes v. Virginia-Colorado Development Corp. [*supra*], specifically over-ruled all departmental decisions purporting to invalidate oil shale claims for failure of assessment work requirements; (2) the subsequent dismissal, adverse to the government, of contest proceedings pending against these and other oil shale claims; and (3) the systematic issuance of patents from 1935 to 1962 to other oil shale claim owners whose claims had purportedly been invalidated for assessment work failure prior to *Ickes* [v. *Virginia-Colorado Development Corp.*].

370 F. Supp. at 124.

As there had been no administrative hearing within the Department to consider other possible grounds for the current invalidity of the claims, the district court remanded the subject cases to the Bureau of Land Management for further action.

As to the challenge of the processing of the patent applications on procedural grounds, the district court was of the opinion that regardless of the notice and hearing provided in the old proceedings, contestees were entitled to present evidence to the Manager on the issue of whether those voidances were themselves invalid.

After commenting on contestees' opportunity to adduce evidence and present argument at trial, and after noting that the parties did not request a remand to the Department, the court found as follows:

1. Whether the Department had repudiated the 1930–33 contests was a question of fact, or of mixed law and fact; rejection of the patent applications constituted a finding that there had been no repudiation of the voidances. The Solicitor's reliance on the notice and hearing provided in 1930–33 as reason for denying a current hearing was erroneous, as contestees sought a hearing on the Department's conduct since 1935. Contestees were therefore entitled to an evidentiary hearing in accordance with the rule of *United States* v. *O'Leary*, 63 I.D. 341 (1956).

2. The court noted without comment contestees' charge that the Solicitor had been impermissibly involved with both the recommendation to reject the patent applications and administrative appellate review of the decisions to do so. The court observed that regulations promulgated in 1972 (now) prevent similar occurrences.

On Sept. 22, 1975, the Tenth Circuit Court of Appeals vacated the decision of the district court. The court perceived the substantive grounds relied upon by the district court to be (1) the vacating effect of the *Shale Oil Co.* decision, *supra;* (2) the Department's "rule" of patenting oil shale claims previously declared void for failure to do assessment work; and (3) estoppel. In the court's view, only grounds (1) and (2) related directly to the Supreme Court's order of remand; ground (3) was deemed an issue relevant to the current validity of the old contests.

The Court of Appeals noted that the district court's holding that the old assessment contests could not furnish a present basis for barring patents to these contestees necessarily encompassed, however, other issue—abandonment, inadequate assessment work, fraud, "and the like"—not previously adjudicated in any administrative proceeding. The Tenth Circuit observed that the issue of the current effect of the previous contests, and whether current judicial review for substantive and procedural errors is possible at this time, would remain to be considered should the district court's decision at 370 F. Supp. 108 be invalidated upon further appellate review.

Thus, in remanding to the district court,[8] The Tenth Circuit directed:

1. Where appropriate, contestees should apply for patent.[9] In those instances where contestees had applied for patent (Bohme, Brown and Exxon), the cases should be remanded to the Department for reconsideration and reprocessing. In either event the Department was directed to assert and consider any and all bases for the invalidity of these claims.

2. On the issue of estoppel, the Department was further directed to receive all competent evidence upon the question of individual reliance upon the actions of Interior during the years 1935–62 regarding the legal effect of the early assessment work contests.

3. After the conclusion of the administrative proceedings, the district court would try the issue of alleged substantive or procedural deficiencies in the old contests, and rule upon the propriety of judicial review at the present time, including taking of additional evidence if necessary. The court required the district court to "supplement its present findings of fact and conclusions of law as needed to dispose of the new matters presented." Order of Remand, Sept. 22, 1975, p. 7. It is noted, however, that the Department was granted an opportunity, in the course of these remand proceedings, to correct any existing procedural errors.

4. In the event the Department asserted no additional bases of invalidity—that is, in addition to old assessment work contests—the parties were invited to enter into a stipulation to that effect, thus eliminating all but the question of the availability at this time of judicial review of the old contests.

By order dated Jan. 17, 1977, the district court remanded these cases for further administrative proceedings. The order of remand directed the Department in material part to:

> (a) consider and rule upon all possible obstacles to the patenting of these claims;
>
> * * * * *
>
> (c) receive all competent evidence on the issue of estoppel, which concerns the question of individual reliance by claimants upon the prior actions of the Department of Interior regarding the effect of the assessment work contests; and
>
> (d) correct any existing procedural errors [[10]] made in prior proceedings.

---

[8] The mandate was recalled by the court on Mar. 1, 1976, and stayed through Apr. 11, 1976, pending the outcome of contestees' petition for writ of certiorari. That petition was denied in June 1976. The district court in turn stayed its order of remand to the Department until it had entered its judgment in *Shell Oil Co.* v. *Kleppe*, 426 F. Supp. 894 (D. Colo. 1977), *aff'd* 591 F. 2d 597 (10th Cir. 1979). The Supreme Court upheld the decision of the court of appeals. *Andrus* v. *Shell Oil Co.*, 48 U.S.L.W. 4603 (June 3, 1980); *see* n. 12, *infra*.

[9] That part of the order pertains to *The Oil Shale Corp.* v. *Kleppe*, No. 74–1344, No. C–8680 in the district court, the only case in which the claimants had not filed patent applications. The district court retained jurisdiction over No. C–8680 pending our decision herein. In the event claimants in that case elect to seek patent, the case will be remanded to the Department. Order of Remand, Jan. 17, 1977 (D. Colo.), p. 2.

[10] As noted in *Hickel* v. *The Oil Shale Corp.*, *supra*, the Secretary held in *Union Oil Co.*, *supra*, that the 1930–33 contest proceedings are subject to reopening as to any locator for whom receipt of service is not adequately shown.

In addition, the Department was directed to consider the implications of the decision by the Tenth Circuit in *Shell Oil Co.* v. *Kleppe*, No. 74–F-739 (D. Colo. Jan. 17, 1977),[11] "wherever relevant to the issues raised at those proceedings."

To conform to the Supreme Court's direction that the Department assert any and all bases for barring contestees' patent applications, the Colorado State Office, Bureau of Land Management (BLM), instituted contest proceedings against these claims in May 1977. The contest complaints charged as to each group of claims (1) lack of discovery of a valuable mineral deposit or, alternatively, that no such discovery presently exists[12]; and (2) that the claims were previously declared invalid in 1930–33, on the ground of failure to perform annual assessment work as required by law. In Contest 659 (Carbon-Elizabeth claims), the United States also charged that these claims were not physically located on the ground prior to the enactment of the Leasing Act, *supra;* that the claims are abandoned; and with respect to one claim, that a defect in title exists. In Contest 658 (Compass Group), the Government additionally charged that the lands embraced by the claims are nonmineral in character and thus not patentable.

Following a prehearing conference with Judge Sweitzer, all counsel agreed that the charge that "annual assessment work has not been performed on these claims as required by law" is the only issue ripe for determination by these administrative proceedings.

In each case contestees generally deny the charges and contend that the contests are barred by estoppel and laches.

On July 18, 1978, a hearing before Administrative Law Judge Harvey C. Sweitzer was conducted. On July 17, 1979, Judge Sweitzer issued his decision dismissing the charge that annual assessment work had not been performed as required by law as to the Compass group (Northwest, Northeast, Southwest and Southeast) and the Oyler group (Nos. 1–4), and sustained as to the Carbon group (Nos. 1–5) and the Elizabeth group (Nos. 1, 2, 4–12, inclusive). Accordingly, the latter placer mining claims were held invalid. These cross-appeals followed. The parties completed their posthearing briefing in January 1980.

---

[11] *See* n. 12, *infra.*

[12] As to this point, on June 2, 1980, the Supreme Court rendered its decision in *Andrus* v. *Shell Oil Co.*, 48 U.S.L.W. 4603 (June 3, 1980). The syllabus of that case recites:

"*Held*: The oil shale deposits in question are 'valuable mineral deposits' patentable under the [Mineral Leasing] Act's saving clause. The Act's history and the developments subsequent to its passage indicate that the Government should not be permitted to invalidate pre-1920 oil shale claims by imposing a present marketability requirement on such claims. The Department's original position, as set forth in Instructions, issued shortly after the Act became law, authorising the General Land Office to begin adjudicating applications for patents for pre-1920 oil shale claims, and later enunciated in *Freeman* v. *Summers*, [52 L.D. 201 (1927)] is the correct view of the Act as it applies to the patentability of pre-1920 oil shale claims."

III. THE DECISION AND ARGUMENTS ON APPEAL

Preliminarily, we will set forth (a) Judge Sweitzer's understanding of counsel's stipulations as presented at the prehearing conference and at the hearing; (b) his procedural rulings and definitions or clarifications (Dec., pp. 4–19).

The Stipulations

Judge Sweitzer's Prehearing Conference Order No. 1 contained the following paragraphs based upon counsel's stipulations:

> **4. In consideration of the decision of the United States District Court for the District of Colorado in *Shell Oil Co. v. Kleppe*, No. 74–F–730 (January 17, 1977), and with a view to expediting the decision of other issues, trial of issues as to discovery of minerals will be deferred pending final decision of the appeal in *Shell Oil Co.* now awaiting argument in the Court of Appeals.**
>
> * * * *
>
> **7. The parties fully reserve their respective contentions heretofore advanced with respect to the effect, if any, of prior administrative decisions in assessment work Contests Nos. 12029, 12039 and 12972.**
>
> **8. The parties contemplate presenting evidence, by stipulation if possible, as to the surface characteristics of the claims in contest and the mineralization at depth.**

Regarding paragraph 7, *supra*, it appears that Judge Sweitzer was of the opinion that, except as to the issue of individual reliance and any supplements to the record on that point, the question of the present effect of the 1930–33 contests had been extensively litigated in the courts and, therefore, in accordance with the Orders of Remand, *supra*, was not to be relitigated in the administrative hearing. Comments of counsel at the prehearing conference, pp. 10–11, are set forth in his decision (Dec., pp. 7–8).

Procedural Rulings

In edited form, we repeat Judge Sweitzer's rulings:

1. The only issue ripe for consideration at the hearing was whether annual assessment work had been performed on the claims as required by law. Judge Sweitzer supported this conclusion with citations to Contestant's Opening Brief, p. 1; Contestees' Opening Posthearing Brief, p. 3; and Contestees' Supplement to Their Opening Posthearing Brief in Contest 658, p. 1 (Dec., p. 10).

2. The Judge referred to his findings in Addenda A and B, relating to the question of reliance by the claimants upon the prior actions of the Department concerning the old assessment contests (Addendum A), and relating to the question of reliance by the claimants upon prior actions of the Department relating to the need to continue to perform annual assessment work (Addendum B).

3. Judge Sweitzer determined that all other possible obstacles—abandonment, fraud, lack of physical location on the ground (Contest 659), and defective title—had been waived by contestant as neither deferred, reserved, nor at issue; he therefore dismissed all charges except that pertaining to assessment

work. The Judge also asserted that the Government had failed to present a prima facie case of such other charges.

4. Regarding the Department's opportunity to correct any existing procedural errors, the Judge understood this directive to refer to the pre-1972 combination of advocacy and appellate functions. Judge Sweitzer noted that contestees had neither raised nor argued alleged procedural error, and concluded that contestees had been afforded a fair hearing within the meaning of the Administrative Procedure Act, 5 U.S.C. § 556 (1976), which had corrected any procedural errors.

5. Judge Sweitzer held that, unlike other Government contests to determine the validity of mining claims, where the charge is nonperformance of assessment work it is similar to a charge of abandonment and implies tacit admission by the Government that the claim is valid in all other respects, thereby making the United States "the proponent of the rule or order," and imposing upon the Government the ultimate burden of proof.

6. Judge Sweitzer determined that a further hearing on the issues dismissed by his decision should not be ordered. As grounds therefor, the Judge cited (a) contestant's opportunity to argue and fully litigate the issues dismissed; (b) the additional time and expense to which contestees would be put by a contrary ruling; (c) that the justification for not ordering a hearing in the instant matter was as compelling as those set forth in *United States* v. *Bowen*, 38 IBLA 390 (1979), in which the refusal of an Administrative Law Judge to order a further hearing was affirmed; and (d) the possible objection of the district court or the court of appeals to any further delay.

7. All arguments or proposed findings and conclusions inconsistent with the decision were rejected as unsupported by the evidence or immaterial.

8. Concerning the contestees' argument that the remand orders did not contemplate requiring an appeal to the Interior Board of Land Appeals, Judge Sweitzer adverted to a letter, dated Feb. 6, 1980, from the Under Secretary to counsel of certain contestees, denying the petition requesting an order that the hearing decision constitute the final decision of the Department.

Judge Sweitzer also noted that for purposes of clarification, all references to an assessment year would utilize the concluding year in which assessment work was due. *See* n. 5, *supra*. Thus, the year 1929 denominates the assessment year commencing July 1, 1928, and ending June 30, 1929.

It is our intention to separately summarize the evidence for each of Judge Sweitzer's rulings, and the contentions of the parties with respect thereto. The decision held that claimants in Contests 658 (Bohme) and 660 (Brown) had substantially complied with the assessment work requirements of the mining law, 30 U.S.C. § 28 (1976). A contrary finding was entered as to Contest 659 (Exxon). The decision also found, with respect to Bohme and Brown, that the claimants had relied upon the acts and statements of the Department from 1930 to 1962 both as to the effect of the old assessment contests (Addendum A) and the need to perform the annual assessment work (Addendum B).

Contestees appeal the adverse ruling as to Contest 659 and urge affirmance of all rulings favorable to them. The Government similarly appeals the findings as to Contests 658 and 660 and certain other rulings. Specifically, the parties argue five principal issues:

1. Whether the Government was correctly required to bear the burden of proving the contest charges against these oil shale claims.

2. Whether contestees have performed annual assessment work as required by law and thereby maintained their claims. Three subissues are presented: What is required by the statute; whether 30 U.S.C. § 28 (1976) governing assessment work is to be read *in pari materia* with 30 U.S.C. § 29 (1976) governing the prerequisites for a patent application; and what is the import of *Hickel* v. *TOSCO*, *supra*, as it concerns these two questions. Contestees specifically contend that an assessment contest must be instituted during a period of default and prior to resumption of development work.

3. The Government challenges the weight and credibility accorded certain evidence (Opening Brief, pp. 41–50). Included in this issue is the question whether the Judge correctly interpreted certain evidentiary stipulations.

4. Whether the decision correctly concluded that claimants had justifiably relied upon the Department's acts and statements from 1930–62 regarding the effect of the old contests and the need to perform assessment work annually.

5. Whether Departmental regulations promulgated prior to Sept. 1, 1972, preclude assessment work contests.

The Burden of Proof

The decision held that: "A Government challenge to the validity of a mining claim alleging failure to perform annual assessment work implicitly acknowledges that a possessory title exists which it is asking be forfeited. * * * [I]n doing this, the Government becomes a proponent of a rule or order that such a forfeiture has occurred" (Dec., p. 18).

In support of this ruling, Judge Sweitzer cited General Land Office Circular No. 460, 44 L.D. 572 (1916), in which it is directed, in pertinent part, that the Government is to assume the burden of proving the charges in contests initiated upon report against claims to the public lands, unless otherwise ordered. For the reasons that follow, we need not consider further points urged in support thereof.

Upon this point, the decision is in error and must be reversed. In *United States* v. *O'Leary*, *supra*, it was determined that hearings relating to the validity of mining claims held before the Department were subject to the provisions of the Administrative Procedure Act. That Act provides that "the proponent of a rule or order has the burden of proof." 5 U.S.C. § 556 (d) (1976). In *Foster* v. *Seaton*, 271 F.2d 836 at 838 (D.C. Cir. 1959), the Court of Appeals upheld the Secretary's ruling that in a mining claim contest, the Government "bears only the burden of going forward with sufficient evidence to establish a prima facie case, and that the burden then shifts to the claimant to show by a preponderance of the evidence that his claim is valid." That decision and its progeny remain valid precedents which may not be ignored. *See, e.g., United States* v. *Zweifel*, 508 F.2d 1150, 1157 (10th Cir. 1975), *cert. denied, sub nom. Roberts* v. *United States*, 423 U.S. 829 (1975), *rehearing denied*, 423 U.S. 1008 (1975); *United States* v. *Springer*, 491 F.2d 239, 242 (9th Cir.), *cert. denied*, 419 U.S. 834 (1974).

We think the error of Judge Sweitzer's ruling on this matter may be rooted in the unfortunate proclivity of the various authorities to suggest that substantial nonperformance of assessment work may equate with abandonment of the claim. As but one example, in *Hickel* v. *TOSCO*, *supra* at 57, the Court stated that defaults in performance of assessment work "*might be* the equivalent of abandonment." We see only a contingent, inconclusive connection.

In the absence of a statutory presumption that a default constitutes abandonment (*see* 43 U.S.C. § 1744 (1976)),[13] the fact of abandonment is determined on the basis of the intention of the party. Thus, a hypothetical mining claimant might have manifested a clear intention not to abandon his claims by each year posting thereon notices of intention to hold them, recording such notices, publishing them in a newspaper, forming a company for the development of his claims, etc., but performing no assessment work whatever. The weight of evidence in such a case would clearly militate against a finding on the basis of common law principles that the mining claimant had "abandoned" the claims. But would that absolve him of the consequences of his failure to meet his statutory obligation to perform assessment work each year for the benefit of each claim? Obviously not.

It is the mining claimant's duty under 30 U.S.C. § 28 (1976) to perform work in the amount of $100 for the benefit of each claim annually, and that is an objective standard which he must meet regardless of other manifestations of his intent to retain the claims. A default, then, if it is to have any consequential effect, must result in *forfeiture*, not abandonment. Of course, where abandonment is charged, the nonperformance of assessment work would have evidentiary value in proving the charge. But why should we concern ourselves with the question of abandonment at all in such a case? It is purely a question of whether the claimant preserved his asserted possessory right to the claims by doing substantially what the statute requires in order to maintain the claims.

---

[13] Sec. 314, Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976), requires the recordation in the proper office of the Bureau of Land Management by the owner of unpatented lode or placer mining claims, or mill or tunnel site claims, of a copy of the official record of the location notice of the claim, and annually a notice of intention to hold the mining claim or an affidavit of assessment work. The section also provides that failure to file the required instruments within the designated time frame shall be deemed conclusively to constitute an abandonment of the mining claim or mill or tunnel site by the owner. Further, nothing in the section shall be construed as a waiver of the assessment or other requirements of the mining law. *See also* 43 CFR Subpart 3833.

While we have noted above that there has been a certain confusion engendered by the occasional equating of the question of a forfeiture for failure to perform assessment work with the question of an abandonment, in the context of oil shale claims it is clear that the distinction has always been recognized. Thus, in *Virginia-Colorado*, *supra*, the Court found that the Department was without jurisdiction to inquire into the failure to perform assessment work. This holding would have been impossible if the Court perceived that the failure to perform the necessary work constituted a claim of abandonment since the Court had always recognized the authority of the Department to invalidate a mining claim upon a charge of abandonment properly proved. Thus, in *Virginia-Colorado*, 295 U.S. at 645–646, the Court expressly noted:

> There is no suggestion of lack of discovery, fraud or other defect. *There is no ground for a charge of abandonment. The allegations of the bill, admitted by the motion to dismiss, dispose of any such contention.* Plaintiff had lost no rights by failure to do the annual assessment work; that failure gave the government no ground for *forfeiture*. *Wilbur* v. *Krushnic, supra.* [Italics supplied.]

[1] Abandonment, being essentially a question of intent, is difficult of proof, and perhaps should impose a heavy evidentiary burden on the one who asserts it. But the assertion that annual assessment work has not been performed is the assertion of a negative fact. If an examination of the claims and the nearby lands does not reveal the accomplishment of the required work, and there is no record of any such work having been performed, then evidence to this effect would be sufficient to establish a prima facie case. It would then devolve on the claimant to show by a preponderance of countervailing evidence that he has substantially complied with the statute.

This is precisely what the Court of Appeals was addressing in *Foster* v. *Seaton, supra:*

> [The claimants,] and not the Government, are the true proponents of a rule or order; namely, a ruling that they have complied with the applicable mining laws. * * * Were the rule otherwise, anyone could enter upon the public domain and ultimately obtain title unless the Government undertook the affirmative burden of proving that no valuable deposit existed. *We do not think that Congress intended*

***to place this burden on the Secretary.* [Italics supplied.]**

271 F.2d at 838.

[2] Although the court there was considering a case in which the Government had charged that no qualifying discovery of a valuable mineral deposit had been made, we are unable to draw a distinction between such cases and those now before us, insofar as the burden of proof is concerned. In a Government contest proceeding to determine the validity of a mining claim, the claimant is always the proponent of the rule or order, always the one claiming to have earned the benefit of the mining laws through his compliance therewith, always the one "seeking a gratuity from the Government." Regardless of whether the issue on which the validity of the claim rests is discovery, mode of location, or performance of assessment work, the relative position and obligation of the contestant and contestee remain the same.

Judge Sweitzer held that in a contest to determine the validity of a mining claim where the charge is nonperformance of assessment work, the burden of proof imposed on the Government is different—and greater—from where the contest is brought on a charge of no discovery of a valuable deposit of minerals. This is so, Judge Sweitzer found, because "performance of assessment work is a condition subsequent to maintain a mining claim after property rights in the claim have been established by the making of a valid mineral location. * * * In this respect, it is not dissimilar to abandonment * * *" (Dec., p. 16; citation omitted).

[3] The vice in this reasoning is dual. First, as we have already pointed out, nonperformance of assessment work bears very little similarity to abandonment. One might just as easily say that a lessee who fails to perform a continuing obligation under a lease had "abandoned" the leasehold. Second, where the Government contests the validity of a claim for nonperformance of annual work, there is nothing inherent or implied in that action which requires a conclusion that the claim is valid in all other respects, nor may the bringing of such an action be treated as tantamount to an admission by the Government that "property rights in the claim have been established by the making of a valid location."

In sum, Judge Sweitzer erred in holding that "the Government [in this case] becomes a proponent of a rule or order that such a forfeiture has occurred," and must, therefore, assume the ultimate burden of proof.

Annual Performance of Assessment Work

Judge Sweitzer construed the Supreme Court's decision in *Hickel* v. *TOSCO*, *supra*, as overruling, *sub silentio*, that portion of *Krushnic*, *supra*, which held that the Government must institute contest proceedings at a time when a rival claimant might challenge the claim—that is, during the period of default and before resumption of work (Dec., pp. 26–7). Contestees contend, in essence, that the fact that the Court declined to expressly overrule the *Krushnic* and *Virginia-Colorado* cases precludes a contrary conclusion. Contestees also argue that the timeliness of a challenge for failure to do assessment work was not before the Court, and therefore the rule enunciated in *Krushnic* has retained its validity.

TOSCO clearly addressed the issue of whether *Krushnic* and *Virginia-Colorado* correctly held that failure to do assessment work furnishes no ground for forfeiture, but inures only to the benefit of relocators. The Supreme Court ruled that the United States is "the beneficiary of all claims invalid for lack of assessment work or otherwise. It follows that the Department of the Interior had, and has, subject matter jurisdiction over contests involving the performance of assessment work." 400 U.S. at 57.

In our view, contestees' argument regarding the timeliness of a Government challenge proves too much. The argument can be sustained only if the relevant discussion in *TOSCO* is ignored. In *TOSCO*, the Court noted that in *Virginia-Colorado* the lapse in assessment work had been held to provide no basis for a charge of abandonment. The decision in *TOSCO* continued:

> We construe that statement to mean that *on the facts of that case failure to do the assessment work was not sufficient to establish abandonment*. But it was well established that the *failure to do assessment work was evidence of abandonment*. *Union Oil Co. v. Smith*, 249 U.S. 337, 349; *Donnelly v. United States*, 228 U.S. 243, 267. If, in fact, a claim had been abandoned, then * * * [t]he United States had an interest in retrieving the lands. [Citations omitted.] The policy of leasing oil shale lands under the 1920 Act gave the United States a keen interest in recapturing those which had not been "maintained" within the meaning of § 37 of that Act. We agree with the Court in *Krushnic* and *Virginia-Colorado* that every default in assessment work does not cause the claim to be lost. *Defaults, however, might be the equivalent of abandonment;* and we now hold that *token assessment work, or assessment work that does not substantially satisfy the requirements of 30 U.S.C. § 28, is not adequate to "maintain" the claims.* [Italics supplied.]

400 U.S. at 56–7.

[4] We find the import of the language emphasized unambiguous: (1) failure to maintain a claim by doing assessment work each year may constitute evidence of abandonment; and (2) independently, a failure to substantially comply with the requirement that annual assessment work be performed (30 U.S.C. § 28 (1976)) requires a finding that the claim has not been "maintained" within the meaning of sec. 37 of the Leasing Act and results in a forfeiture of the claim.

Thus, in both *Krushnic* and *Virginia-Colorado*, the Supreme Court found that an abandonment could not be found by the mere fact of omission of one year's assessment work, particularly in the light of the claimants' subsequent actions. Similarly, the one year's deficiency in assessment work was held not to constitute a failure to "substantially satisfy" the assessment requirements. Contestees, in contending that a Government challenge to a failure to perform assessment work must be initiated during the period of nonperformance, have confused the requirements for showing an abandonment, as explicated in *Krushnic* and *Virginia-Colorado*, with the requirements for establishing a forfeiture, as delineated in *TOSCO*.

Contestees also contend that the Departmental regulations in effect prior to Sept. 1, 1972, preclude a Government challenge premised on a failure to perform assessment work prior to that date. Such a contention finds little support in other cases considered by the Supreme Court. Thus, the Court stated in *Cameron* v. *United States*, 252 U.S. 450, 459–61 (1920):

> By general statutory provisions the execution of the laws regulating the acquisition of rights in the public lands and the general care of these lands is confided to the land department, as a special tribunal; and the Secretary of the Interior, as the head of the department, is charged with seeing that this authority is rightly exercised to the end that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved. [Citations omitted.]
>
> A mining location which has not gone to patent is of no higher quality and no more immune from attack and investigation than are unpatented claims under the homestead and kindred laws. If valid, it gives to the claimant certain exclusive possessory rights, and so do homestead and desert claims. But no right arises from an invalid claim of any kind. All must conform to the law under which they are initiated; otherwise they work an unlawful private appropriation in derogation of the rights of the public.
>
> Of course, the land department has no power to strike down any claim arbitrarily, but so long as the legal title remains in the Government it does have power, after proper notice and upon adequate hearing, to determine whether the claim is valid and, if it be found invalid, to declare it null and void. This is well illustrated in *Orchard* v. *Alexander*, 157 U.S. 372, 383.
>
> * * * [T]o the same effect is *Michigan Land & Lumber Co.* v. *Rust*, 168 U.S. 589, 593, where in giving effect to a decision of the Secretary canceling a swamp land selection by the State of Michigan theretofore approved, but as yet unpatented, it was said: "It is, of course, not pretended that when an equitable title has passed the land department has power to arbitrarily destroy that equitable title. It has jurisdiction, however, after proper notice to the party claiming such equitable title, and upon a hearing, to determine the question whether or not such title has passed. [Citations omitted.] In other words, the power of the department to inquire into the extent and validity of the rights claimed against the Government does not cease until the legal title has passed."

It is now beyond cavil that the Secretary of the Interior has subject matter jurisdiction to determine whether unpatented oil shale mining claims were maintained within the meaning of the savings clause in sec. 37 of the Leasing Act, including performance of adequate annual assessment work. *Hickel* v. *TOSCO*, *supra*.

Although the Department did not contest unpatented oil shale claims for failure to perform annual assessment work for many years following *Krushnic* and *Virigina-Colorado*, because of its misunderstanding of its authority to do so, such earlier inaction does not make the present contests improper.

For the reasons discussed above, we affirm Judge Sweitzer's holding that a contest to determine whether a failure to substantially satisfy the requirements of 30 U.S.C. § 28 (1976), has resulted in a forfeiture of the claim is not barred by a resumption of assessment work.

Contestees also contend that these contests are barred by the performance, for each claim involved in these contests, of $500 worth of assessment work as a prerequisite for obtaining a patent, as required by 30 U.S.C. § 29 (1976).

An applicant for a patent must show, *inter alia*, that $500 worth of labor or improvements has been expended upon the claim by the claimant or his grantor. 30 U.S.C. § 29 (1976). Contestees argue that the Court in TOSCO did not consider or rule upon whether secs. 28 and 29 must be read *in pari materia*. In effect, contestees maintain that inasmuch as under sec. 29, a total expenditure of $500 is all that is needed to entitle a claimant for a patent, completion of expenditures in that amount constitutes "substantial satisfaction" of the requirements for annual expenditure found in sec. 28.

We agree with Judge Sweitzer that this contention is without support, either in the statutory scheme of the mining law, or the Departmental decisions holding that the purpose for doing assessment work under secs. 28 and 29 is the same. We recognize that both requirements are grounded in the same consideration: to encourage actual development of mineral lands. *United States* v. *Coleman*, 390 U.S. 599 (1968); *United States* v. *Iron Silver Mining Co.*, 128 U.S. 673 (1888). But this very purpose would not be served if contestees' argument was accepted. Under their argument it would be possible to expend $500 in the initial assessment year, and hold a claim for decades without any further expenditure. Surely, this is not what Congress had in mind in requiring annual expenditures on each claim. Rather, Congress enacted a scheme in which no claim could proceed to patent prior to the expenditure of $500 for development thereof. In the alternative, if a claimant chose not to go to patent, he was required to expend $100 in each year on the claim. It was the choice of the claimant who, upon expending $500 for the development of the claim, nevertheless decided not to apply for patent, which resulted in the requirement that the claimant annually expend $100 towards the claim's development. Until final certificate issues, a mineral claimant is obligated, under the provisions of sec. 28, to expend $100 annually. This is so whether such claimant has expended $500 or $5,000 on the claim. There is nothing inconsistent in the requirements of secs. 28 and 29. The decision of Judge Sweitzer is affirmed with regard to this issue.

Judge Sweitzer's decision holds that annual assessment work requirement of 30 U.S.C. § 28 (1976), is satisfied by "a reasonably persistent effort to comply annually with the $100 assessment work requirement but that an occasional failure to literally comply will be excused" (Dec., p. 30). In addition, Judge Sweitzer found "that the data in evidence which were recorded or filed do not necessarily show all the work that was performed" (Dec., p. 31). The Judge also found that "the work that the evidence shows to have been done was performed in good faith, * * * tended to develop the claims, and to facilitate the eventual extraction of ore therefrom" (Dec., p. 32). It is correctly pointed out that the obligation to perform assessment work annually ceases following the issuance of final certificate. 43 CFR 3851.5.

According to Judge Sweitzer's tabulations, assessment work, statutory suspensions, or lieu notices appear for each of the following years for the Compass claims: 1919, 1920–30, 1931 for the Southwest claim only, 1932, 1949, and 1955 (Dec., p. 37). Contestees in No. 658 filed patent applications in June 1959; final certificate issued in August 1961. Thus the *record* evidence shows that out of 43 years, the requirements of 30 U.S.C. § 28 (1976) were satisfied in only 14 of those years and 15 years in the case of the Southwest claim only. A lengthy excerpt of the testimony of John W. Savage, a contestee in No. 658, is set forth as evidence of additional assessment work performed not of record.

Mr. Savage testified that at a time near the filing of the patent application, contestees took steps to be certain that $500 worth of work had been performed; that though "considerable amounts" of assessment work was done at that time, "no record was kept of this kind of thing because we believed that the only amount of labor and improvements necessary to get patent was a total of $5-hundred worth"; that contestees had secured aerial photographs of the "whole Coal Ridge"; that road work was done, though the witness did not know whether it benefited the claims or the surrounding patented land; and that contestee ceased filing affidavits of assessment work "a long time prior" to receipt of final certificate (Dec., pp. 37–41).

The Judge concluded that this showing of additional work was "in no way overcome by Contestant." Thus, contestant had not shown a failure to substantially comply with the labor requirements (Dec., p. 42). Accordingly, the charge of failure to do annual labor was dismissed as to the Compass claims.

Regarding the rulings pertaining to Contest No. 658, contestant here asserts that the Judge misunderstood certain stipulations. In that connection, the Government states that in each case the parties had stipulated that there was no assessment work of record other than that furnished by contestees in the abstracts of title filed in support of their patent applications. In Contest 658, the stipulated evidence consists of three mineral reports and the mineral examiner's discussion of geology and assessment work (Opening Brief, p. 39).

Judge Sweitzer held that the Government's assertions that this testimony should be discounted were unpersuasive, noting that counsel for the Government had the opportunity to cross-examine Mr. Savage, to clarify his testimony, and to make appropriate argument regarding the stipulation or its intended purpose and effect, and had failed to so avail himself.

Judge Sweitzer found that contestees in Contest No. 659 satisfied assessment requirements in 1919 (lieu), 1920–26, 1932 (suspended), 1957, and 1958 (Dec., p. 44). Application for patent was filed in 1959; final certificate never issued. Because contestees' predecessors in interest ceased performing assessment work prior to the decision of *Krushnic, supra*, in 1930, he determined that contestees could not assert reliance on Departmental policy implementing that decision. The Carbon-Elizabeth claims were declared null and void for lack of substantial compliance with the provisions of 30 U.S.C. § 28 (1976).

As to the Oyler claims in Contest No. 660, the decision found substantial compliance demonstrated by the following: at least $400 worth of labor was done for the four claims as a group in 1917–19, 1921, 1923–25. In 1922, 1926, 1927, and 1928, the annual expenditure was less than $400 ($100 per claim) (Dec., pp. 45–46).

Specifically, no work was done on the Oyler No. 1 for the years 1924–26, and in 1922 the amount was less than the statutory $100 minimum. For the years 1922–25, no work was done in the Oyler No. 2 and in 1923 and 1926 the amount was less than $100. No work was done on the Oyler No. 3 in 1926 and 1928. No work was done on the Oyler No. 4 in 1926, and in 1922, 1923, and 1927, the work was less than the statutory minimum. Adequate work was done in 1930, no work in 1931, performance was suspended in 1932, and lieu or notices of intent were filed for 1933, 1935–38, and 1949. In 1939, the claimants filed a declaration of intent to "claim all benefits of a Supreme Court decision favoring such holding," Exh. P–346 ¶ 24, which was not filed pursuant to any statute. This data was gleaned, in part, from the 1929 and 1931 mineral examination reports of the General Land Office. The parties stipulated the admission of these reports, Exh. P–346. Finally, the decision contains the statement that affidavits asserting the performance of $100 of annual labor had been performed as *to each claim for 1924 and 1925.* In addition, it is noted that the parties stipulated that because of weathering and age, a current physical examination of the claims must be deemed unreliable to conclusively show the number or extent of all the improvements and work thereon (Dec., pp. 45–47).

From this, it was held that the Government had failed to show a default in substantially complying with the assessment work requirements of the law. In so ruling, the Judge reasoned that the 1929 mineral report shows work continued on one or more of the claims for the years 1921–28, and from this concluded by implication that claimants "intended to, and did, accomplish the work to benefit each of the claims in the value of at least $100 per year, notwithstanding [the mineral examiner's] allocation of the work" (Dec., p. 47).

For the period of time from 1931 to Aug. 28, 1956, when final certificate issued for the Oyler claims, the Judge relied in part on an historical sketch prepared in 1952 by contestees' predecessors in interest, Exhs. P–334 and 335. It is conceded in the decision that this sketch is "very general" as to what work benefited the Oyler claims and as to when the work was done (Dec., p. 48). Contestant concedes that the 1929 mineral report shows that more labor was actually performed than that appearing of record, but characterizes such additional labor as "spotty." It is argued, however, that much of the labor was disallowed, omitted or inadequate (Opening Brief, p. 46).

Contestant also contends that the historical sketch referred to above provides no factual basis for these rulings, that it is incredible, and further, that the Judge failed to regard the document as a whole in concluding that the matters discussed therein refer to the Oyler claims. Specifically, the Government states that the Oyler claims are listed as the first oil shale claims acquired by the Index Oil Shale Company (Index), followed by the acquisition of the Mt. Blaine claims. It is argued that all the labor discussed in the rest of Exh. P–335 pertains to the Mt. Blaine claims, and that the narrative shows that no work was performed at all from 1932 to 1952. The final page of the historical sketch contains a statement to the effect that annual labor was done by and at the expense of Index.

In addition to the findings set forth, in each case the decision found that at least $500 worth of assessment work had been performed on or for the benefit of each of the claims, and that work had been resumed on each claim prior to the institution of contest proceedings.

Before we proceed to address specific contentions respecting the findings in each contest, we must consider Judge Sweitzer's formulation of the standard for determining whether a claimant has substantially complied with the annual assessment work requirements. As noted, the decision states that a reasonably persistent effort is contemplated by *TOSCO* and that occasional failures are excusable with the meaning of that decision.

We cannot agree with that formulation. It is clear beyond peradventure that *TOSCO* holds that in order to maintain a claim in compliance with the mining law of 1872,

$100 worth of assessment work must be done each year. 400 U.S. at 54.

In determining what constitutes substantial compliance with 30 U.S.C. § 28 (1976), resort to the facts of *Krushnic* and *Virginia-Colorado* is necessary. In each case the mining claimant had failed to perform assessment work in only a single year after the location of the claims; in the latter case, it was argued that resumption of work was prevented by actions of the Government. There was no question, as in these appeals, of whether claimants performed less than $100 of work in other assessment years. Moreover, in *TOSCO*, the Court unambiguously distinguished the facts of these cases: "Unlike the claims in *Krushnic* and *Virginia-Colorado*, the Land Commissioner's findings indicate that the present claims had not substantially met the conditions of § 28 respecting assessment work. Therefore we cannot say that *Krushnic* and *Virginia-Colorado* control this litigation." 400 U.S. at 57. We reject the "reasonably persistent" standard, applied by Judge Sweitzer, on the ground that it impermissibly and erroneously liberalizes the court's holding in *TOSCO*, despite the Supreme Court's express statement that the rule of *Krushnic* and *Virginia-Colorado* was to be confined to a narrow ambit.

We turn now to the contentions in each case above set forth. We find that the holding in Contest No. 658 is correct. Contestees stipulated that the assessment work of record is accurate, although incomplete (Tr. 20). As mentioned, the decision found that assessment work had been performed 14 or 15 of the 43 years between location and issuance of final certificate. John Savage's testimony was offered as evidence of additional work done not of record. That testimony establishes that contestees did some road work between 1954 and 1968. The assertion of considerable additional work arises from the witness' statements that he did additional work though some of the improvements were difficult to find (Dec., p. 38), although he did not attempt to allocate any expenditures expressly to the Compass claims (Dec., p. 39). It should be noted that the witness admitted that he could not tell how much additional work not of record has been done (Dec., p. 40), and that he did not know how much of the additional work was for the oil shale claims or the surrounding patented Timber and Stone Act claim (Dec., pp. 39, 41).

We hold that the contestant presented a prima facie case of lack of substantial compliance with 30 U.S.C. § 28 (1976). The burden then shifted to the contestees to show by a preponderance of evidence that substantial compliance with the assessment requirements had been made. *Hickel* v. *TOSCO*, *supra*. We agree with Judge Sweitzer that contestees' evidence preponderates over that adduced by the Government. Judge Sweitzer noted:

> Contestees' evidence in this regard may have been objectionable in part (but was received without objection) and it is not without ambiguity, for example, as to

> just how much work would inure to the benefit of the Compass claims and for which years, and the surprising but unrebutted and unexplained statement that "there were affidavits of labor of one sort or another for every year from 1890 to 1950." But it is adequate, in the absence of even a scintilla of a contrary showing, to require a determination that Contestant has not met its burden.

(Dec., p. 42). We have noted above our disagreement with the Judge's allocation of the burden of proof. Nevertheless, in view of the failure of the contestant to either attack the credibility of this evidence or to submit more evidence in addition to that which established its prima facie case, we must hold that appellant in Contest No. 658 has preponderated over the Government's showings. Accordingly, we hold that contestees have shown substantial compliance with the requirements of 30 U.S.C. § 28 (1976), as explicated by the Supreme Court in *TOSCO*.

The decision in Contest No. 659 declaring the Carbon-Elizabeth claims null and void is affirmed. Contestees' evidentiary arguments in support of reversal are founded on the erroneous assumption that the Government bears the burden of proof and need not be considered further. We have also already disposed of the contention that 30 U.S.C. §§ 28 and 29 (1976) are to be read *in pari materia*. For the reasons hereinbefore discussed, the evidentiary record as to these claims does not support a finding that contestees have substantially performed assessment work as the term was construed in *TOSCO*, and Judge Sweitzer's decision is accordingly affirmed.

Regarding the Oyler claims in Contest No. 660, we find certain contradictions within the evidence, and reflected in the decision, which must be resolved against contestees. First, it is noted that the parties stipulated that certain mineral reports set forth all evidence of record concerning performance of assessment work. Exh. P–346. In addition, the mineral examination reports contain certain findings allocating the work among the four claims. Exh. P–346, pp. 6–8. It was incorrect for the Judge to substitute his inferences for the facts as stipulated. Assessment work issues are not to be adjudicated on the basis of inferences derived from previous "patterns" of conduct. Moreover, the inference is unjustified. Contrary to the Judge's conclusion, there is ample evidence to conclude that the "continuing pattern of performing the work" did not occur each year; such evidence is found in the facts as stipulated and as found by the Judge.

We note, for example, that the statement that affidavits of labor in the amount of $100 were filed for each claim in 1924 and 1925 (Dec., p. 46), directly contradicts the data set forth in the 1929 mineral report. We believe we are bound by the facts as stipulated for the years 1921–28, and to the extent that the decision is inconsistent with the following, it is reversed :

	No. 1	No. 2	No. 3	No. 4	Total
1921	$600.40	$600.40	$600.40	$600.40	$2,401.60
1922	52.80		183.80	89.00	325.60
1923	346.25	64.20	319.58	82.30	812.33
1924			186.27	224.20	410.47
1925			370.05	144.40	514.45
1926		40.00			40.00
1927	100.00	100.00	100.00	82.30	382.30
1928	100.00	100.00		100.00	300.00
	1,199.45	904.60	1,760.10	1,322.60	5,186.75

Exh. P–346, p. 8.

As mentioned, the decision in Contest No. 660 relied in part on an historical sketch. Our reading of Exh. P–335 convinces us of the correctness of contestant's contentions that this document should be accorded little, if any, weight. We disagree with contestant's assertion that the document shows that no labor was done from 1932 to 1952, and conclude, rather, that work ceased in 1938 or 1939 (Exh. P–335, p. 15). We do agree, however, that the text of the narrative describes "work done on the land comprised of the placer oil shale claims in the Mt. Blaine group" (Exh. P–335, p. 17). As to the Oyler claims, "[i]t was the intention of the Index Company eventually to establish a plant on this site." *Id.* Moreover, the narrative was prepared, it appears, for use in a suit to quiet title to all claims held or formerly held by the Index Company. *Id.* An illegible signature appears over the names of the president and manager of the company, which was dissolved in 1939. It thus appears that there is merit in contestant's suggestion that this document is self-serving.

We think contestees have failed to establish substantial compliance with the requirements of 30 U.S.C. § 28 (1976), and accordingly, the Oyler claims are declared null and void.

Estoppel and Laches

The question of the applicability of estoppel arises in a number of different aspects in Judge Sweitzer's decision. In the text of the decision he found that under the doctrine expounded in *Atlantic Richfield Co.* v. *Hickel*, 432 F.2d 587, 592 (10th Cir. 1970), "an administrative determination running contrary to law will not constitute an estoppel against the federal government." Thus, he found that the Government was not estopped by either the *Shale Oil Co.*, 55 I.D. 287 (1935), or the pre-1972 regulations, to contest the oil shale claims for failure to substantially satisfy the requirements of 30 U.S.C. § 28 (1976) (Dec., pp. 48–53).

Addendum A to Judge Sweitzer's decision dealt with the question of reliance by the individual claimants on prior Departmental actions regarding the effect of the old assessment work contests in light of the decisions in *Krushnic* and *Virginia-Colorado.* Judge Sweitzer found that all of the claimants, or their predecessors in interest had relied on Departmental assurances that the old contest proceedings were nullities.

Addendum B concerned the question of reliance by the claimants upon the prior actions of the Department regarding the need to perform annual assessment work. Judge Sweitzer found, in effect, that the individual claimants and their predecessors in interest had relied upon assertions of the Department that failure to perform assessment work was of no concern of the Department.

With regard to Addendum A, we note that the question of the legal efficacy of the old assessment work contests has been reserved by the Federal courts, and we will accordingly make no comments thereon. Insofar as Judge Sweitzer's findings of reliance in Addendum A are concerned, we find that these findings are supported by the record and concur therein.

Similarly, we agree with Judge Sweitzer that, even were estoppel available relating to the need to perform annual assessment work, the principle upheld in *Atlantic Richfield Co.* v. *Hickel, supra,* would prohibit the application of estoppel. We do not agree, however, with Judge Sweitzer's findings that the claimants, in deciding not to perform annual assessment work, relied on Departmental actions.

[5] The fundamental flaw in Judge Sweitzer's findings on this point is one which recurs throughout the contestee's arguments on estoppel. The simple fact is that contestees can point to no decision of any Federal court, or any formal decision or Instruction issued by the Department of the Interior that ever purported to hold that a mining claimant was not required under 30 U.S.C. § 28 (1976) to perform annual assessment work. The decisions in *Krushnic* and *Virginia-Colorado* dealt not with the question whether oil shale claimants were required to comply with the provisions of sec. 28, but whether the United States would be a beneficiary of a failure to perform the assessment work. Indeed, both *Krushnic* and *Virginia-Colorado* expressly noted that a mining claimant was required to perform labor of $100 annually for each claim. *See* 280 U.S. at 317; 295 U.S. at 645. The Departmental decisions and pronouncements to which contestees advert were of similar import.

Thus, contestees, in effect, are arguing that an equitable estoppel should lie because they knowingly violated an affirmative obligation under the law in reliance on the fact that they were immune from punishment. They are attempting to resort to equity to absolve themselves from the consequences of their willful violations of the mining law. Among the cardinal principles of equity, however, are the maxims that equity may be invoked only to do equity, and that one who seeks equitable relief must do so "with clean hands." Appellants can show no equitable basis for the invocation of an estoppel to excuse their past failures to perform the annual assessment work mandated by 30 U.S.C. § 28 (1976).

[6] Regarding the defense of laches, Judge Sweitzer found that in the first instance the defense of laches is not available against the Government in cases involving public lands, citing *United States* v. *California*, 322 U.S. 19, 40 (1947), and secondly, that even were laches determined to be an available defense, it would clearly be circumscribed by the same limitations surrounding the doctrine of estoppel (Dec., pp. 53–54). We agree.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of Judge Sweitzer in Contest No. 658, dismissing the complaint against the Southwest, the Northwest, the Northeast, and the Southeast placer mining claims is affirmed; the decision of Judge Sweitzer in Contest No. 659, holding that the Carbon placer mining claims Nos. 1 to 5, inclusive, and the Elizabeth placer mining claims Nos. 1, 2, and 4–12, inclusive, invalid is affirmed; and the decision of Judge Sweitzer in Contest No. 660, dismissing the complaint against the Oyler placer mining claims Nos. 1 to 4, inclusive, is reversed, and the Oyler Nos. 1 to 4 are hereby declared invalid.

Douglas E. Henriques
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

James L. Burski
Administrative Judge

APPENDIX

In past years Congress has from time to time suspended the need to perform annual assessment work on unpatented mining claims. Generally, if not in all cases, a notice of intent to hold the claim was required. Periods of suspension were:

Jan. 1, 1893 to Dec. 31, 1893 (28 Stat. 6)

Jan. 1, 1894 to Dec. 31, 1894 (28 Stat. 114)

Jan. 1, 1913 to Dec. 31, 1913 (38 Stat. 235)

Jan. 1, 1917 to Dec. 31, 1918 (40 Stat. 343)

Jan. 1, 1919 to Dec. 31, 1919 (41 Stat. 279 & 354)

Jan. 1, 1931 to July 1, 1932 (47 Stat. 291 & 474)

July 1, 1932 to July 1, 1933 (48 Stat. 72)

July 1, 1933 to July 1, 1934 (48 Stat. 777)

July 1, 1934 to July 1, 1935 (49 Stat. 337)

July 1, 1935 to July 1, 1936 (49 Stat. 1238)

July 1, 1936 to July 1, 1937 (50 Stat. 306)

July 1, 1937 to July 1, 1938 (52 Stat. 1243)

July 1, 1941 to July 1, 1943 (56 Stat. 271)

May 3, 1943 to July 1, 1947 (57 Stat. 74)

June 30, 1947 to July 1, 1948 (61 Stat. 213)

June 17, 1948 to July 1, 1948 (62 Stat. 475)

July 1, 1948 to July 1, 1949 (62 Stat. 571)

July 1, 1949 to July 1, 1950 (63 Stat. 200 & 213)

In addition, personnel in military service were excused from doing assessment work for certain periods of the Spanish American War, World War I, and World War II. The respective acts are found in 30 Stat. 651, 40 Stat. 243, and 54 Stat. 1188.

The Act of July 3, 1942 (56 Stat. 647) provided for suspension of assessment work on claims withdrawn for national defense efforts in the prosecution of World War II.

APPEAL OF EYAK CORPORATION

4 ANCAB 277

Decided *June 30, 1980*

Appeal from decision of the Bureau of Land Management (BLM) AA-8447-A and AA-8447-B.

Affirmed and appeal dismissed.

1. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Jurisdiction—Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Third-Party Interests

Where the State of Alaska has issued patent to a third party on lands tentatively approved to the State under the Alaska Statehood Act, the proper forum to adjudicate the status of such patent is a court, and the Department lacks administrative jurisdiction over the issue.

2. Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Third-Party Interests

Contracts for the sale of real property, issued by the State of Alaska for lands in tentatively approved State land selections under the Statehood Act, are valid existing rights leading to the acquisition of title, protected by exclusion from conveyances to Native corporations under the Alaska Native Claims Settlement Act, as interpreted by Secretary's Order No. 3029 (43 FR 55287 (1978)).

3. Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Third-Party Interests—Alaska Native Claims Settlement Act: Withdrawals and Reservations: Withdrawals for Native Selection: State-Selected Lands

In the case of unlisted villages a period occurred, after enactment of the Alaska Native Claims Settlement Act and before the villages filed for eligibility, in which tentatively approved land selections of the State of Alaska were not yet withdrawn for potential village selections, and during this period the State could still create third-party interests in such lands.

4. Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Third-Party Interests—Alaska Native Claims Settlement Act: Withdrawals and Reservations: Withdrawals for Native Selection: State-Selected Lands

In the case of unlisted villages, third-party interests created by the State of Alaska on tentatively approved lands after enactment of the Alaska Native Claims Settlement Act are entitled to protection as valid existing rights provided such interests were created before the unlisted village applied for eligibility and lands were withdrawn for it.

APPEARANCES: Dennis P. James, Esq., and David J. Walsh, Esq., Moderow, Walsh, Johnson & James, on behalf of Appellant, Eyak Corp.; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, on behalf of the Bureau of Land Management.

OPINION BY ALASKA NATIVE CLAIMS APPEAL BOARD

SUMMARY OF APPEAL

The Eyak Corp. objects to exclusion from its land conveyance of a number of patents and contracts for the sale of real property issued by the State of Alaska on lands selected and tentatively approved for conveyance to the State under the Alaska Statehood Act. Eyak contends that the State lacked authority to create such permanent third-party interests in lands to which the State had not itself received patent. Sec. 11(a)(2) of ANCSA prevents the State from creating third-party interests after Dec. 18, 1971, on tentatively approved State land selections withdrawn for selection by a Native village listed in ANCSA. However, the Board finds that this prohibition cannot apply in the case of an unlisted village until such village applies for eligibility and land is withdrawn for it. Where third-party interests leading to title are created under State law on TA'd lands after enactment of ANCSA, but before withdrawal of the land for selection by an unlisted village, such interests are valid existing rights as interpreted by Secretary's Order No. 3029, and are protected from conveyance to Eyak Corp. The Board finds that exclusion of these interests from conveyance to Eyak Corp. was correct.

JURISDICTION

The Alaska Native Claims Appeal Board pursuant to delegation of authority to administer the Alaska Native Claims Settlement Act, 85 Stat. 688, *as amended*, 43 U.S.C. §§ 1601–1628 (1976 and Supp. I 1977), and the implementing regulations in 43 CFR Part 2650 and 43 CFR Part 4, Subpart J, hereby makes the following findings, conclusions and decision.

PROCEDURAL BACKGROUND

Eyak was an unlisted village which applied for eligibility in 1973. In July of 1973, PLO 5353 (38 FR 19825 (July 24, 1973)) withdrew lands for selection by Eyak, pending determination of its eligibility. The lands withdrawn were T. 15 S., R. 2 W., Copper River meridian. Eyak was certified as an eligible village Dec. 17, 1974.

This appeal, from a Bureau of Land Management decision to convey land to Eyak Corp., was timely filed July 27, 1978.

The Board on Dec. 26, 1978, in an order segregating lands in dispute in two companion appeals, noted that the lands in dispute in the present appeal did not need to be segregated from the conveyance to Eyak to allow prompt conveyance of undisputed lands, because the disputed lands were excluded from the conveyance to Eyak in the decision to convey. The order listed the excluded lands as a matter of information.

The Board on Sept. 21, 1978, suspended action on the appeal pending reconsideration by the Secretary of the Interior of Secretary's Order No. 3016 (Dec. 14, 1977) (85

I.D. 1 (1977)). The circumstances of this reconsideration must be understood in connection with the present appeal.

The issues raised by Eyak Corp. involve whether certain State created third-party interests (patents and contracts for the sale of lands) constitute valid existing rights, protected under ANCSA, and, if so, how such interests should be protected. The Board had, in two previous cases (*Appeal of Eklutna, Inc.*, 1 ANCAB 190, 83 I.D. 619 (1976) [VLS 75-10]; and *Appeals of State of Alaska and Seldovia Native Association, Inc.*, 2 ANCAB 1, 84 I.D. 349 (1977) [VLS 75-14/75-15]), ruled on issues involving such valid existing rights.

Expressing doubts about the validity of State issued patents of lands which have been tentatively approved but not patented to the State, the Board nevertheless in the *Seldovia* appeals, ruled:

> The effect of the issuance of a patent to public lands by the United States, even if issued by mistake or inadvertence, is to transfer the legal title from the United States and to end all authority and jurisdiction in the Department of the Interior over the lands conveyed. [Citations omitted.] As to the issue of determining jurisdiction, the Board accords a final patent issued to a third party by the State of Alaska prior to ANCSA the same dignity as a Federal patent. The proper forum to adjudicate the status of such an interest is in a judicial proceeding and the Board lacks jurisdiction to decide the issue.

Appeals of State of Alaska and Seldovia Native Association, Inc., 2 ANCAB 1, 58-59, 84 I.D. 349, 375 (1977) [VLS 75-14/75-15].

The Secretary of the Interior, in Secretary's Order No. 3016, *supra*, subsequently adopted certain policies on the interpretation of valid existing rights under ANCSA which, as to appeals not yet decided, effectively reversed portions of the Board's decision in the *Eklutna* and *Seldovia* cases. Following the issuance of Secretary's Order No. 3016, *supra*, the Secretary agreed to reconsider this Order after accepting briefs from interested parties. The Board therefore suspended action on all appeals involving valid existing rights pending the reconsideration.

The reconsidered Order was designated Order No. 3029, and was published in the Federal Register. (43 FR 55287 (1978)). The Board is bound by published Secretarial statements of policy.

Upon publication of Order No. 3029, *supra*, the Board on Dec. 4, 1978, ended suspension of the appeal and directed the parties to file any further briefing they wished the Board to consider on whether interests asserted by the appellant constituted valid existing rights as interpreted by Order No. 3029, *supra*. Upon motion by BLM, the Board, on Dec. 20, 1978, allowed the BLM 30 days after filing of the appellant's statement of reasons in which to respond. The appellant did not file a statement of reasons. On July 18, 1979, the Board issued an order directing filing of the statement of reasons and scheduling briefings. The order stated.

> 1. Eyak Corporation shall, within fifteen (15) days from the date of this

> Order, either file a statement of reasons and standing as required by regulations in 43 CFR 4.903(b), or, in the alternative, advise the Board whether it considers its reasons for appeal to have been adequately briefed in its Notice of Appeal. If the appellant does not respond to this Order within fifteen (15) days, the Board will treat appellant's Notice of Appeal as its statement of reasons in deciding the appeal.

Eyak Corp. has filed nothing further. BLM accordingly filed a response to the appellant's Notice of Appeal.

BLM contends that the Secretary, in Order No. 3029, *supra*, found that State-created third-party interests in tentatively approved land pursuant to the Alaska Statehood Act, 72 Stat. 339, 48 U.S.C. Prec. § 21 (1958), were valid existing rights. BLM further references regulations in 43 CFR 2650.3-1(a) which provide:

> Pursuant to sections 14(g) and 22(b) of the act, all conveyances issued under the act shall exclude any lawful entries or entries which have been perfected under, or are being maintained in compliance with, laws leading to the acquisition of title, but shall include land subject to valid existing rights of a temporary or limited nature such as those created by leases (including leases issued under section 6(g) of the Alaska Statehood Act), contracts, permits, rights-of-way, or easements.

DECISION

The Appellant, Eyak Corp., objects to the exclusion from its land conveyance of a number of patents and contracts for the sale of real property issued by the State of Alaska. The lands in which the State created these third-party interests were State land selections which had been tentatively approved under the Alaska Statehood Act, *supra*. The Eyak Corp. contends that the State of Alaska exceeded its authority under § 6(g) of the Statehood Act, *supra*, by creating permanent third-party rights on land selections which were only tentatively approved, but not yet patented, to the State.

BLM asserts that since Eyak's appeal is expressly limited to rights leading to acquisition of title, *i.e.*, patents and contracts for the sale of real property, BLM properly excluded these interests pursuant both to the above regulations and to Order No. 3029, *supra*.

The Board agrees with BLM.

[1] As to State issued patents, the Board's ruling in the *Seldovia* appeals remains undisturbed by the Secretary in Order No. 3029, *supra*. Where the State of Alaska has issued patent to a third party on lands tentatively approved to the State under the Alaska Statehood Act, *supra*, the proper forum to adjudicate the status of such a patent is a court, and the Department lacks administrative jurisdiction over the issue.

[2] Contracts for the sale of real property, issued by the State of Alaska for lands in tentatively approved State land selections under the Statehood Act, *supra*, are valid existing rights leading to the acquisition of title. protected by exclusion from conveyances to Native corporations, under ANCSA as interpreted by Order No. 3029, *supra*.

The Solicitor's Opinion on which the Secretary relies in Order No.

3029, *supra*, adopts the position that State-created third-party interests are, in fact, issued under Federal law, *i.e.*, the Alaska Statehood Act, *supra*, rather than under individual land disposal statutes enacted by the State. He states:

> First, the authority of the State to create third party interests in tentatively approved (T.A.'d) lands comes from section 6(g) of the Statehood Act, quoted in pertinent part above. Although the State has exercised this authority through State legislation which defines the terms on which persons may acquire leases, etc., the Congress, in ANCSA, clearly considered such leases to be issued under Federal law, namely the Statehood Act. Section 11(a)(2), for example, withdraws T.A.'d land "from the creation of third party interests by the State under the Alaska Statehood Act." Section 14(g), as already stated, refers to leases "issued under section 6(g) of the Alaska Statehood Act." [43 FR 55288 (1978).]

The Solicitor also asserts that the listing of rights to be protected, in various sections of ANCSA, is not exhaustive. The Solicitor concluded "the department's regulations have construed 'valid existing rights' under ANCSA to include rights perfected or maintained under State as well as Federal laws leading to the acquisition of title."

Accordingly, the Board's ruling in the *Seldovia* and *Eklutna* cases that valid existing rights to be excluded from conveyances to Native corporations must be those rights created under Federal law and leading to acquisition of title is modified, insofar as it did not include State-created interests leading to fee title, by Order No. 3029, *supra.*

Taking the position that protection for State-created valid existing rights is not limited to that offered by § 14(g) of ANCSA, the Solicitor states,

> The fact that Congress expressly referred only to leases issued by the State is not persuasive evidence that Congress intended no other State-created interests to be protected. The reasons for Congress' special emphasis on State leases is entirely understandable.
>
> The House Committee report reflects Congress' concern that a lease issued by the State which on its terms was conditional on the issuance of a patent to the State not be terminated by virtue of the Native Selection. H.R. Report No. 92-523, 92d Cong., 1st Sess. (1971), p. 9.
>
> It is well-known that ANCSA was the subject of intense concern to the oil and gas industry which had mineral leases on State selected lands. It is therefore not surprising that Congress paid special attention to State-issued leases. But that is not that is not [sic] to say that Congress was unaware of or unconcerned with State issued patents, which were equally conditional on the issuance of a federal patent to the State. Thus the House Committee report, *supra*, states: "Section 11(i) protects all valid rights * * *." If it had intended to protect only leases or only rights of a temporary nature the use of the word "all" would seem inappropriate. [43 FR 55289 (1978).]

Although it was not raised by the parties, the Board notes an additional issue in this appeal, arising from the fact that Eyak is an unlisted village.

Sec. 11(a)(2) of ANCSA withdraws TA'd land in the vicinity of Native villages "from the creation of third party interests by the State under the Alaska Statehood Act."

Order No. 3029, *supra*, concluded that third-party interests created by the State in TA'd lands *prior to enactment of ANCSA* were valid existing rights, protected from Native selection. In this appeal, the disputed patents and contracts of sale were not issued prior to enactment of ANCSA. (Dec. 18, 1971.) They were not executed until 1974, and therefore appear not to be valid existing rights.

However, Eyak was an unlisted village; that is, Eyak was not one of the 205 villages listed in § 11(b)(1) of ANCSA as "Native villages subject to this Act." Eyak was certified as a village eligible for benefits under ANCSA under the provisions of § 11(b)(3) and implementing regulations in 43 CFR 2651.2(a)(6), which allowed an unlisted village to file an application for a determination of eligibility with the Bureau of Indian Affairs (BIA) by Sept. 1, 1973.

This affects the date on which land withdrawals were made for village selections. Sec. 11(a)(3)(B) of ANCSA requires land in the vicinity of each village to be withdrawn for possible village selection within 60 days from the date of enactment of ANCSA, Dec. 18, 1971, "or as soon thereafter as practicable." Land withdrawals for listed villages could, at least theoretically, be made within the 60-day period because the location of the villages was known on the date of enactment. In the case of unlisted villages, however, land withdrawals could not be made until the village applied to BIA for an eligibility determination; BIA was then required to forward the application, which was to identify the township in which the village was located, to BLM. Regulations in 43 CFR 2651.2(a)(7) (1979) provide, "The receipt of the selection application for filing by the Bureau of Land Management shall operate to segregate the lands in the vicinity of the village as provided in sections 11(a)(1) and (2) of the act."

As noted, withdrawal provisions in § 11(a)(2) of ANCSA provide:

> All lands located within the townships described in subsection (a)(1) hereof that have been selected by, or tentatively approved to, but not yet patented to, the State under the Alaska Statehood Act are withdrawn, *subject to valid existing rights*, from all forms of appropriation under the public land laws, * * * *and from the creation of third party interests by the State under the Alaska Statehood Act*. (Italics added.)

Thus, once TA'd land was withdrawn for selection by a village, the State could not have legally created any third-party interests in that land, regardless of selection and tentative approval under the Statehood Act, *supra*.

[3] However, land was not uniformly withdrawn for unlisted villages within 60 days after the enactment of ANCSA, as it was for those villages listed in the Act. A period occurred after enactment of ANCSA and before unlisted villages filed their applications for eligibility, in which tentatively approved State land selections surrounding unlisted villages was not yet withdrawn for potential village selections; during this period, the State could still create third-party interests in such lands.

[4] Thus, in the case of land surrounding an unlisted village, third-party interests created by the State of Alaska on tentatively approved lands *after* enactment of ANCSA could also be entitled to protection as valid existing rights provided such interests were created *before* the unlisted village applied for eligibility and the surrounding lands were withdrawn for it. Review of the record indicates that this occurred in the case of Eyak.

The decision here appealed recites that on Aug. 27, 1973, the Village of Eyak filed an application for a determination of its eligibility as an unlisted village. However, it appears that Eyak prior to this date advised BLM of its intention to apply for eligibility, because in July of 1973 PLO 5353, *supra*, was issued and published in the Federal Register, withdrawing lands for selection under ANCSA pending determinations of eligibility of several unlisted Native villages, including Eyak.

Briefs filed by BLM and the State of Alaska indicate that all patents and contracts of sale disputed in this appeal were issued by the State subsequent to withdrawal of the disputed lands for selection by the unlisted Village of Eyak subject to a determination of its eligibility.

However, the State asserts that when it received tentative approval to the lands, in July 1972, the lands were already subject to existing Forest Service recreational leases, dating from the 1950's and 1960's. Pursuant to State law (Alaska Stat. § 38.05.068) holders of valid Forest Service leases had a preference right to purchase from the State those lands which had been leased to them. Accordingly, the Department of Natural Resources in April 1973, offered the Forest Service lessees the opportunity to file applications under the preference right provision. All applications were filed with the State on Apr. 30, 1973, prior to the withdrawal of lands for Eyak. Therefore, the State argues, although the contracts of sale based on these applications were not executed until 1974, after withdrawal of land for Eyak, the Forest Service lessees had valid existing rights prior to this time based on their occupancy pursuant to valid Forest Service leases and their applications for preference right under State statute.

The Board concludes that within the contemplation of Order No. 3029, *supra*, valid existing rights in the leases in question, predecessors to the contracts of sale and patents here in dispute, were created pursuant to State law prior to the withdrawal of land for the unlisted Native Village of Eyak.

Accordingly, the Board finds that the disputed patents and contracts for the sale of real property, issued by the State of Alaska for lands tentatively approved but not yet patented to the State under the Statehood Act, *supra*, within the contemplation of Order No. 3029, *supra*, are valid existing rights leading to fee title which must be excluded from conveyances to Native corporations under ANCSA, and

BLM Decision AA-8447-A and AA-8447-B is hereby affirmed.

This represents a unanimous decision of the Board.

Judith M. Brady
Administrative Judge

Abigail F. Dunning
Administrative Judge

Joseph A. Baldwin
Administrative Judge

APPEAL OF BRUCE McALLISTER

4 ANCAB 294

Decided *June 30, 1980*

Appeal from the Decision of the Bureau of Land Management AA-6701, 42 FR 41929 (Aug. 19, 1977).

Reversed in part.

1. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Decisions

The Board is bound by statements of policy made by the Secretary of the Interior and contained in a published Departmental Manual Release or in a Secretarial Order published in the Federal Register.

2. Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Third-Party Interests

Lands tentatively approved for conveyance under the Alaska Statehood Act and leased by the State of Alaska pursuant to its open-to-entry lease program prior to enactment of the Alaska Native Claims Settlement Act must, pursuant to Secretary's Order No. 3029 (43 FR 55287 (1978)), be excluded from conveyance under ANCSA as valid existing rights leading to the acquisition of title.

3. Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Third-Party Interests

The policy expressed in Secretary's Order No. 3029 (43 FR 55287 (1978)), is applicable to all lands still within the Department's jurisdiction, even if the decision to convey such lands pursuant to the Alaska Native Claims Settlement Act was issued by the Bureau of Land Management prior to publication of Order No. 3029.

4. Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Third-Party Interests

Tentative approval of land selections by the State of Alaska under the Statehood Act was rescinded by the Bureau of Land Management to permit conveyance of the same lands to a Native corporation under the Alaska Native Claims Settlement Act. Subsequently, Secretary's Order No. 3029 (43 FR 55287 (1978)) found that third-party interests leading to fee title, created by the State in such lands, were valid existing rights which must be excluded from conveyance to the Native corporation. Accordingly, BLM must reinstate tentative approval of the State's selection of such lands so that the State is able to grant title to such third parties as contemplated by Order No. 3029.

APPEARANCES: Charles Cranston, Esq., Gallagher, Cranston & Snow, on behalf of appellant; A. Robert Hahn, Esq., Hahn, Jewell & Stanfill, on behalf of Seldovia Native Association, Inc.; James N. Reeves, Esq., and Shelley J. Higgins, Esq., on behalf of the State of Alaska; James D. Linxwiler, Esq., on behalf of Cook Inlet Region, Inc.; Andrew R. Sarisky, Esq., on behalf of the Kenai Peninsula Borough; John M. Allen, Esq., and M. Francis Neville, Esq., Office of the Regional Solicitor, on behalf of the Bureau of Land Management.

OPINION BY ALASKA NATIVE CLAIMS APPEAL BOARD

SUMMARY OF APPEAL

This appeal involves the question of whether an open-to-entry lease issued by the State of Alaska prior to enactment of the Alaska Native Claims Settlement Act (ANCSA) on lands tentatively approved to the State but subsequently withdrawn by § 11(a)(2) of ANCSA for possible Native selection is protected under ANCSA. The Board finds the question is answered in the affirmative by Secretary's Order No. 3029; that the Board is bound by published Secretarial Orders; and that Order No. 3029 is applicable to all lands still within the Department's jurisdiction. The Board concludes that the open-to-entry lease here appealed must be excluded from conveyance to the Native corporation, and that the Bureau of Land Management must reinstate tentative approval of the State's selection of the land underlying the lease so that the State is able to grant title to the lessee as contemplated by Order No. 3029.

JURISDICTION

The Alaska Native Claims Appeal Board, pursuant to delegation of authority to administer the Alaska Native Claims Settlement Act, 85 Stat. 688, *as amended*, 43 U.S.C. §§ 1601–1628 (1976 and Supp. I 1977), and the implementing regulations in 43 CFR Part 2650 and 43 CFR Part 4, Subpart J, hereby makes the following findings, conclusions and Decisions reversing in part the above-designated decision of the Bureau of Land Management.

PROCEDURAL BACKGROUND

On June 13, 1962, the State filed a selection application for lands near the Native Village of Seldovia. On Jan. 3, 1964, the Bureau of Land Management (BLM) issued a decision to tentatively approve conveyance to the State of certain lands within T. 8 S., R. 14 W., Seward meridian. Prior to Dec. 18, 1971, the State issued open-to-entry (OTE) lease ADL 50791 for a tract within the subject lands. On Dec. 18, 1971, § 11 of ANCSA withdrew for Native selection the lands surrounding the Village of Seldovia, including lands in the preceding State selection. On Feb. 11, 1974, Seldovia filed village selection application AA–6701–A for lands located near the village, including lands within the prior State selections.

Without adjudicating Seldovia's selection application, the BLM on Oct. 3, 1974, vacated the tentative approval previously given for conveyance of the subject lands to the State. The Board, in *Appeal of the State of Alaska*, 1 ANCAB 281, 83 I.D. 685 (1976) [VLS 75–8], vacated the BLM decision and remanded the cause to BLM for further proceedings, on the grounds that BLM's decision had been based on the mere filing of a selection application by Seldovia, and was thus premature.

On Aug. 16, 1977, the BLM issued its second decision to issue conveyance of the subject lands to Seldovia. The lands which had been State selected and tentatively approved were found to have been properly selected under village selection application AA–6701–A. Accordingly, the tentative approval previously given for conveyance of lands to the State was rescinded in part, and the underlying State selection applications rejected in part.

In its decision to issue conveyance, the BLM found that the subject lands

> do not include any lawful entry perfected under or being maintained in compliance with laws leading to acquisition of title.
>
> In view of the foregoing, the surface estate of the following described lands * * * is considered proper for acquisition by Seldovia Native Association, Inc. and is hereby approved for conveyance pursuant to section 14(a) of the Alaska Native Claims Settlement Act.

Continuing, the BLM provided:

> The grant of lands shall be subject to:
>
> * * * * * * *
>
> 5. The following third party interests, created and identified by the State of Alaska, as provided by section 14(g) of ANCSA, all of which are located in T. 8 S., R. 14 W., Seward Meridian:
>
> a. Open-to-entry leases, each approximately 5 acres in size.
>
> * * * * * * *
>
> (7) ADL 50791 located in NE¼NE¼ of section 23 and NW¼NW¼ of section 24.

On Sept. 19, 1977, Bruce McAllister, lessee under lease number ADL 50791, filed his Notice of Appeal from the above-referenced decision of the BLM. Mr. McAllister appealed the BLM decision on the grounds that (1) the BLM erred in rejecting the State's selection application, and (2) the BLM's decision granting lands to Seldovia subject to appellant's OTE lease in unclear at best, inconsistent at worst.

Appellant prayed that the Board:

(1) Reverse the BLM decision and order that Seldovia has no right, title or interest in and to the land described in OTE lease ADL 50791,

(2) or, in the alternative, to interpret the BLM decision as declaring that Seldovia takes title to the described land subject to appellant's right to exercise his option to acquire fee title thereto.

Following appellant's filing of the Notice of Appeal, the Secretary of the Interior issued Secretary's Order No. 3016, 85 I.D. 1 (Dec. 14, 1977). Secretary's Order No. 3016, *supra*, was a response to and partial reversal of the position taken by the Board in *Appeals of State of Alaska and Seldovia Native Association, Inc.*, 2. ANCAB 1, 84 I.D. 349 (1977) [VLS 75–14/75–15]. The Board had held that, pursuant to ANCSA, land previously tentatively approved for conveyance to the State was to be conveyed to Native corporations subject to OTE leases issued by the State, but that at the end of the lease term, the lessee's rights would end, and the lessee could not enforce the option provided by Alaska statute to receive patent to the land because title to the land would have passed to the Native corporation upon conveyance and the State no longer would have title to grant to the lessee.

In Secretary's Order No. 3016, *supra*, the Secretary determined that State of Alaska OTE leases issued prior to the effective date of ANCSA on lands tentatively approved to the State, together with the lessee's statutory option to purchase the lands, were valid existing rights protected pursuant to § 14 (g) of ANCSA. The Secretary declared that conveyances to Native corporations should be issued subject to such OTE leases, and that the purchase option could subsequently be exercised by the lessee against the grantee Native corporation.

On Mar. 24, 1978, this Board was notified that the Secretary had decided to reconsider Secretary's Order No. 3016, *supra*. Pending reconsideration, the Board on Mar. 29, 1978, suspended further briefing in this appeal.

On Nov. 20, 1978, the Secretary of the Interior issued Order No. 3029, 43 FR 55287 (1978). Order No. 3029, *supra*, reaffirmed the Secretary's position in Secretary's Order No. 3016, *supra*, that rights created pursuant to the State of Alaska's OTE lease program are valid existing rights within the meaning of ANCSA. Revising his earlier position, though, that conveyances of land under ANCSA should be issued subject to previously-issued OTE leases, the Secretary declared that land covered by such leases should be excluded from conveyances to Native corporations. Also, the Secretary referred to the Solicitor the question of whether the Order should be applied retroactively to decisions of this Board and of the BLM issued prior to publication of Order No. 3029, *supra*.

On Dec. 4, 1978, the Board terminated the suspension of action in this appeal and directed all parties to file, within thirty (30) days from receipt of its order, any further briefing. Seldovia, claiming that this appeal would be directly affected by the Solicitor's forthcoming ruling on retroactivity, requested an extension of time for final briefing. Given the procedural complexity of Order No. 3029, *supra*, as it affected the conveyance of land to Seldovia, and in an effort to insure that all OTE leaseholders would be accorded uniform treatment in the application of Order No. 3029, *supra*, the Board granted an extension of time in which to file a final brief until thirty days after the Solicitor's ruling on retroactivity.

The issue of retroactivity was decided Mar. 27, 1980. By publication of Departmental Manual Release Number 2246, 601 DM2, the Secretary decided that the policy set forth in Order No. 3029, *supra*, would be applied retroactively. The Secretary adopted the memorandum of the Solicitor dated June 2, 1979 (attached as Appendix 3 to 601 DM 2), as the position of the Department and decided that the policy stated in Order No. 3029, *supra*, would apply to all land still within the Department's jurisdiction.

The Board, on May 9, 1980, ordered the record of the appeal closed as of June 9, 1980, but allowed the filing of additional briefing prior to State, and the appellant each filed an additional brief pursuant to the Board's order.

DECISION

[1] The Board has previously held that it is bound by statements of Secretarial policy contained in a Secretarial Order published in the Federal Register. *Appeal of Ouzinkie Native Corp.*, 4 ANCAB 3, 86 I.D. 618 (1979) [VLS 78-7]. The Board is also bound by statements of policy made by the Secretary and contained in a published Departmental Manual Release.

[2] Thus, the Board is bound by the Secretarial policy expressed in Order No. 3029, *supra*, and in Departmental Manual Release Number 2246, *supra*, which policy is dispositive of this appeal. Specifically, lands tentatively approved for conveyance under the Alaska Statehood Act, July 7, 1958, 72 Stat. 339, 48 U.S.C. Prec. § 21 (1958), and leased by the State pursuant to its OTE lease program prior to enactment of ANCSA must, pursuant to Order No. 3029, *supra*, be excluded from conveyance under ANCSA as valid existing rights leading to the acquisition of title. Further, the OTE lessees are not precluded by the ANCSA conveyance from receiving patent for the leased land from the State.

[3] This policy is applicable to all lands still with in the Department's jurisdiction, even if the decision to convey such lands under ANCSA was issued prior to publication of Order No. 3029, *supra.*

[4] Tentative approval of land selections by the State of Alaska under the Statehood Act, *supra*, was rescinded by BLM to permit conveyance of the same lands to Seldovia under the Alaska Native Claims Settlement Act. Subsequently, Order No. 3029, *supra*, found that third-party interests leading to fee title, created by the State in such lands, were valid existing rights which must be excluded from conveyance to the Native corporation. Accordingly, BLM must reinstate tentative approval of the State's selection of such lands so that the State is able to grant title to such third parties as contemplated by Order No. 3029, *supra.*

ORDER

It is therefore Ordered that the decision of the Bureau of Land Management here appealed is reversed to the following limited extent:

(a) The BLM's rejection of State of Alaska selection application A-057388 is reversed insofar as the rejection applies to lands covered by OTE lease ADL 50791 issued by the State of Alaska.

(b) Lands covered by OTE lease ADL 50791 shall be excluded from those lands to be conveyed to Seldovia Native Association, Inc.

All pending motions of the parties before the Board in this appeal not hereby addressed are denied.

The Bureau of Land Management is hereby directed to take action consistent with this decision.

This represents a unanimous decision of the Board.

JUDITH M. BRADY
Administrative Judge

ABIGAIL F. DUNNING
Administrative Judge

JOSEPH A. BALDWIN
Administrative Judge

U.S. GOVERNMENT PRINTING OFFICE : 1980 O - 324-693 : QL 3

RIGHT-OF-WAY REQUIREMENTS FOR GATHERING LINES AND OTHER PRODUCTION FACILITIES LOCATED WITHIN OIL AND GAS LEASEHOLDS*

M-36921 *June 19, 1980*

1. Mineral Leasing Act: Generally—Oil and Gas Leases: Generally—Rights-of-Way: Act of February 25, 1920

Sec. 28 of the Mineral Leasing Act of 1920, 30 U.S.C. § 185 (1976), is not applicable to on-lease oil and gas production facilities which are included in a surface use and operations plan, and which are authorized by the approval of an application to conduct leasehold operations or construction activities.

2. Rights-of-Way: Act of February 25, 1920—Oil and Gas Leases: Communitization Agreements—Oil and Gas Leases: Unit and Cooperative Agreements

Federal lands included in a unit agreement approved pursuant to 30 CFR Part 226 or a communication agreement approved pursuant to 43 CFR 3105.2 are treated like an individual oil and gas leasehold for the purpose of determining whether rights-of-way are required for facilities located thereon.

3. Mineral Leasing Act: Generally—Oil and Gas Leases: Generally—Rights-of-way: Act of February 25, 1920

Sec. 29 of the Mineral Leasing Act of 1920, 30 U.S.C. § 186 (1976), has consistently been interpreted as not providing authority separate from sec. 28 of the Mineral Leasing Act, 30 U.S.C. § 185 (1976), for oil and gas pipeline rights-of-way. Instead, it reserves to the United States the right to allow other rights-of-way or to lease other minerals on Federal land already leased for the extraction of one mineral, and allows the reservation of the right to dispose of the surface of land leased for mineral extraction "insofar as said surface is not necessary to the use of the lessee in extracting and removing deposits thereon."

4. Mineral Leasing Act: Generally—Oil and Gas Leases: Generally—Oil and Gas Leases: Stipulations—Secretary of the Interior

The Secretary has broad power to regulate all on-lease activities by oil and gas lessees and operators pursuant to the conditions contained in oil and gas leases and his general regulatory authority under the Mineral Leasing Act. The procedures for regulating activities on oil and gas leases, established under Secretarial Order 2948 and the BLM–USGS Cooperative Procedures Agreement implementing that order, reserve to the Department the authority to protect the United States legal interests in the property. The Secretary has broad discretion either to continue this procedure, or to substitute any other delegation of his authority and any other reasonable regulatory procedure which he concludes would equally protect the United States interests.

5. Federal Land Policy and Management Act of 1976: Rights-of-Way—Mineral Leasing Act: Generally—Oil and Gas Leases: Generally—Rights-of-Way: Act of February 25, 1920—Rights-of-Way: Federal Land Policy and Management Act of 1976

All facilities related to an oil and gas lease which are located on Federal land outside the lease, regardless of their nature, may be constructed only after appropriate rights-of-way have been granted. Similarly, on-lease oil and gas transportation facilities and on-lease commercial facilities require rights-of-way. Depending on the nature of the facility, the right-of-way would be granted pursuant to either sec. 28 of the Mineral Leasing Act of 1920, 30 U.S.C. § 185 (1976), or Title V of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1761–1771 (1976).

---

*Not in chronological order.

Solicitor's Opinion, M–36575 (Aug. 26, 1959), affirmed in pertinent part; Continental Oil Co., 68 I.D. 186 (1961), overruled in pertinent part.

OPINION BY OFFICE OF THE SOLICITOR

To: Assistant Secretary, Energy and Minerals Assistant Secretary, Land and Water Resources

From: Solicitor

Subject: Right-of-Way Requirements for Gathering Lines and Other Production Facilities Located Within Oil and Gas Leaseholds

SUMMARY

Questions have been raised regarding the legality and administrative practicality of revisions to 43 CFR Part 2880 recently promulgated by the Bureau of Land Management (BLM). 44 FR 58126 (Oct. 9, 1979). These regulations deal with the management of oil and natural gas pipelines on federal lands. The provisions in question, which change existing practices, require that oil and gas lease operations[1] obtain rights-of-way from BLM pursuant to sec. 28 of the Mineral Lands Leasing Act of 1920 (the Act), *as amended*, 30 U.S.C. § 185 (1976), for gathering lines and other production facilities located within the boundaries of oil and gas leases issued under sec. 17 of the Act, 30 U.S.C. § 226 (1976).

In response to these questions, we have thoroughly examined the Act, its legislative history, and its past administration by the Department, and have concluded the following:

(1) Sec. 28 is not applicable to on-lease production facilities which are included in a surface use and operations plan, and which are authorized by the approval of an application to conduct leasehold operations or construction activities, such as an application for permit to drill (APD).[3]

(2) Although sec. 28 is not applicable in the circumstances listed above, the Secretary has broad power to regulate all on-lease activities by lessees pursuant to his general regulatory authority under the Act,

---

[1] This opinion uses the terms "lessee" and "lease operator" interchangeably. See also note 3, *infra*.

[2] As explained herein, this opinion defines "production facilities" to include a lessee's storage tanks and processing equipment, oil and gas pipelines upstream from any of the lessee's storage tanks or processing equipment (or, in the case of gas, upstream from the point of delivery) and pipelines and equipment (such as water disposal lines and gas or water injection lines) which are used in the production process for purposes other than carrying oil or gas downstream from the wellhead.

[3] For the purposes of this opinion, Federal lands included in a unit agreement approved pursuant to 30 CFR Part 226 or included in a communitization agreement approved pursuant to 43 CFR 3105.2 are treated like an individual lease. *See* 30 U.S.C. § 226(j) (1976). Thus a unit operator is not required to obtain sec. 28 rights-of-way for on-unit production facilities when those facilities are approved in the manner described above.

30 U.S.C. §§ 187, 189 (1976). As a corollary to his regulatory authority, the Secretary has broad discretion to determine the procedural mechanism by which the regulation occurs.

(3) Off-lease facilities on federal lands, regardless of their nature, on-lease oil and gas transportation facilities, and on-lease "commercial" facilities[4] may be constructed only after an appropriate right-of-way has been granted. Depending on the nature of the facility, the right-of-way would be granted pursuant to either sec. 28 or Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1761–1771 (1976).[5]

BACKGROUND

The Mineral Lands Leasing Act of 1920, *as amended*, 30 U.S.C. §§ 181 *et seq.* (1976), provides for the disposition of the right to extract certain minerals owned by the United States, including the leasing of lands for the production of federally owned oil and gas. In addition, sec. 28 of the Act, *as amended*, authorizes the issuance of rights-of-way through federal lands "for pipeline purposes for the transportation of oil, natural gas, synthetic liquid or gaseous fuels, or any refined product produced therefrom." 30 U.S.C. § 185 (1976).

New BLM regulations published at 44 FR 58126 (Oct. 9, 1979), which revise 43 CFR Part 2880, are designed to implement amendments to sec. 28 that were enacted as Title I of Pub. L. 93–153, 87 Stat. 576 (1973). Prior to the Nov. 8, 1979, effective date of these regulations, no sec. 28 right-of-way was required as a matter of Departmental practice for gathering lines and other production facilities located wholly on-lease. The prior procedure for approving such facilities on land under the jurisdiction of the Department was established by Secretarial Order No. 2948 (1972) and by the "Cooperative Procedures of August 29, 1975, Pertaining to Onshore Oil, Gas and Geothermal Resources Operations, Implementation of Secretarial Order No. 2948, between Bureau of Land Management and the U.S. Geological Survey." Pursuant to the Secretarial Order and the cooperative procedures agreement, responsibility for oil and gas leasing and for approval of lease operations was apportioned between BLM and USGS. BLM exercised the Secretary's discretionary authority to determine whether, and under what conditions, to issue oil and gas leases. USGS was responsible for all geologic, engineering, and economic value determinations. Although USGS was primarily responsible for direct dealings with lease operators, all plans of operations and applications for permits to drill were transmitted by USGS to BLM for concurrence and for the addition of any stipulations necessary to protect the surface interests for which BLM is responsible.

---

[4] "Commercial" facilities are defined in Sec. 5, *infra*.

[5] See note 19, *infra*.

In contrast to the prior procedures, the new BLM regulations define the term "pipeline" to include all production facilities beyond the wellhead,[6] thus requiring sec. 28 rights-of-way for such facilities even when they are located wholly on-lease. The preamble to the new regulations recognizes that "this new procedure is a departure from the past Departmental policy of including gathering lines on leases in the plan of operations on the lease." 44 FR 58126 (Oct. 9, 1979). Although not expressly stated in that preamble, this change was in fact prompted by the prior Department decision in *Continental Oil Co.*, 68 I.D. 186 (1961), and the statement of Senator Melcher in the legislative history of the 1973 amendments to sec. 28, both of which are discussed in some detail below.

This change prompted questions to be raised both within and without the Department regarding applicability of sec. 28 to on-lease production facilities.

DISCUSSION

1. *Sec. 28 and its Legislative History*

As originally enacted, sec. 28 of the Act read in relevant part as follows:

> Sec. 28. That rights of way through the public lands, including the forest reserves, of the United States are hereby granted *for pipe-line purposes for the transportation of oil or natural gas* to any applicant possessing the qualifications provided in section 1 of this Act, to the extent of the ground occupied by the said pipe line and twenty-five feet on each side of the same under such regulations as to survey, location, application, and use as may be prescribed by the Secretary of the Interior and upon the express condition that such pipe lines shall be constructed, operated, and maintained as common carriers: *Provided*, That the Government shall in express terms reserve and shall provide in every lease of oil lands hereunder that the lessee, assignee, or beneficiary, if owner, or operator or owner of a controlling interest in any pipe line or of any company operating the same which may be operated accessible to the oil derived from lands under such lease, shall at reasonable rates and without discrimination accept and convey the oil of the Government or of any citizen or company not the owner of any pipe line, operating a lease or purchasing gas or oil under the provisions of this Act: *Provided further*, That no right of way shall hereafter be granted over said lands for the transportation of oil or natural gas except under and subject to the provisions, limitations, and conditions of this section.

Mineral Lands Leasing Act of 1920, ch. 85, § 28, 41 Stat. 449 (italics added).

Neither the Act itself, nor the committee reports, defined the term "pipeline" or indicated whether sec. 28 was meant to apply to on-lease production facilities such as gathering lines. However, this issue was discussed briefly in a colloquy on the floor of the House of Representatives during consideration of a predecessor to the bill ultimately enacted.[7] The discussion was initiated by Rep. Mondell, who favored the fifty foot right-of-way grant ultimately enacted, rather than the twenty foot grant included in H.R. 16136, then under consideration.

---

[6] Sec. 2880.0-5(l) of the regulations defines "pipeline" to include "trunk lines, gathering lines and related facilities." The definition of "related facilities" in sec. 2880.0-5(k) includes, *inter alia*, "water and gas injection lines."

MR. MONDELL

* * * * *

Let me call the attention of the chairman of the committee to some facts in reference to this particular situation. There is a general provision in this law for rights of way across public lands necessary for the utilization of the products of the lands leased. Under that general provision the Secretary could take care of all the rights of way of owners for their personal pipe lines leading to points of shipment or to tanks. The section we are now considering, however, seems to be drawn for the purpose of providing for that very class of pipe line.

The pipe lines that are really important, so far as the question of right of way is concerned, are the great carrying lines. There have already been two, over 60 miles long each, constructed in my State under the act that I have referred to. [[8]] I think one of them cost $600,000. I do not know how much the other cost. Such lines are large. They are very expensive. Ordinarily they require pumping plants. The provisions of this section are not sufficiently liberal to allow the construction of one of these great lines.

* * * * *

MR. MONDELL. These small lines that the gentleman from Oklahoma [Rep. Ferris] is evidently providing for in section 17 [[9]] should not in all cases be common carriers, because they are likely to be the lines of little fellows who are simply attempting to reach the nearest tank. But surely the big lines ought to be common carriers.

* * * * *

MR. FERRIS

* * * * *

The gentleman from Wyoming said something to the effect that little oil producers might be forced to become common carriers when they wanted to build a pipe line for themselves. There is an answer to that statement, and it is conclusive. Little fellows, so called, do not build pipe lines. Pipe lines are built usually by big companies like the Standard Oil Co. or some arm of the Standard Oil Co. My State has several pipe lines in it. Several of them claim to be independent lines, but it is generally understood that they are mostly under the Standard Oil. They go under different organizations and names, but when you trace them down you will find that the stockholders are about the same.

Anyway, a little one-horse oil driller does not build pipe lines.

* * * * *

MR. MANN. Suppose a lease is made, and the Government still owns title to the land, and the man who has the lease could not construct a pipe line for even 10 feet on Government land without it being a common carrier.

MR. FERRIS. That is true.

MR. MANN. Is it necessary for these people to construct pipe lines for short distances, at least, as a usual thing?

MR. FERRIS. As a usual thing it is not. I am familiar with that proposition. Now, this is what happens: When an oil field comes in an oil driller makes a find. A big

---

[7] Because the Act was the product of several Congresses, and because section 28 as ultimately enacted was substantially similar to the analogous sections of earlier bills, the legislative history of such earlier bills is a "very revealing" aid in interpreting sec. 28. *Wilderness Society* v. *Morton*, 479 F. 2d 842, 856 (D.C. Cir.), *cert. denied*, 411 U.S. 917 (1973).

[8] Act of May 21, 1896, ch. 212, 29 Stat. 127 ("An Act to grant right of way over the public domain for pipe lines in the States of Colorado and Wyoming").

[9] Sec. 17 of H.R. 16136 was the predecessor of sec. 28 of the Act.

> rush follows immediately. I have been through it in our State, and I know how it works. The oil people rush in and get leases, and buy and sell them, and speculate on them, and in some instances pay prices out of proportion to what they are worth. Then they go and appeal to a pipe-line company to put in a lateral. In the meantime they often store their oil in earthen tanks or ponds.
>
> MR. MANN. Do they not have to build a pipe line themselves to reach the lateral pipe line?
>
> MR. FERRIS. They do not do it in our State.
>
> MR. MANN. I think generally they do.
>
> MR. FOSTER. They do not in Illinois.
>
> MR. MOSS of West Virginia. They do not in any State.
>
> MR. FERRIS. No; they go and make an appeal to the pipe-line company to build the lateral.
>
> MR. MANN. Do they build it right up to the oil well?
>
> MR. FOSTER. They build it right up to a man's tank.

51 Cong. Rec. 15418–20 (1914).

This colloquy, which, as far as we have discovered, was the only discussion related to the issue of on-lease rights-of-way during the entire six years that Congress considered the original Mineral Leasing Act, offers limited help in solving the issue. Initially, it should be noted that the "general provision" authorizing rights-of-way for the personal pipelines of lessees, to which Rep. Mondell referred, apparently did not exist in H.R. 16136. The only section at all related to rights-of-way, other than the predecessor of sec. 28, was sec. 24 of H.R. 16136, the predecessor of what is now sec. 29 of the Act, 41 Stat. 449, 30 U.S.C. § 186 (1976).[10] However, that section has consistently been interpreted as not providing authority separate from sec. 28 for oil and gas pipeline rights-of-way. *Continental Oil Co.*, 68 I.D. 186 (1961). Instead, it reserves to the United States the right to allow other rights-of-way or to lease other minerals on federal land already leased for extraction of one mineral, *see George W. Harris (on rehearing)*, 53 I.D. 508 (1931), and allows the reservation of the right to dispose of the surface of land leased for mineral extraction "insofar as said surface is not necessary to the use of the lessee in extracting and removing the deposits therein." 30 U.S.C. § 186 (1976). *See Carlin* v. *Cassriel*, 50 L.D. 383 (1924).

Regarding the application of sec. 28 to on-lease production facilities, two conflicting inferences can be drawn from this colloquy. On one hand, the discussion makes it clear that Congress was differentiating between producers and transporters of oil and gas, and felt that sec. 28 would apply only to the latter. On the other hand, though, it is also clear either that oil and gas producers were not then customarily building the extensive on-lease gathering systems and production facilities which are common today, or alternatively, that Congress simply was unaware of such facilities. It is not entirely clear that Congress would have differentiated between production and transportation, had it been aware of the extensive production facilities which are now customary.

---

[10] The text of sec. 29 is included in note 17, *infra*.

There is thus considerable doubt that sec. 28, as originally enacted in 1920, was intended to apply to on-lease production facilities of the type then in use. But in order to determine Congressional intent regarding the more extensive on-lease facilities now in use, it is necessary to consider the subsequent amendments to sec. 28 and their legislative history. Since its original enactment, sec. 28 has been amended three times, in 1935,[11] 1953,[12] and 1973.[13] Only the 1973 amendments appear to shed additional light on the intended application of sec. 28.[14]

Those amendments, enacted as part of Pub. L. 93–153, while not wholly unambiguous, present evidence that Congress did not envision sec. 28 as applying to on-lease production facilities. Sec. 28(r)(4), *as amended*, states:

> The Government shall in express terms reserve and shall provide in every lease of oil lands under this chapter that the lessee, assignee, or beneficiary, if owner or operator of a controlling interesting in any pipeline or of any company operating the pipeline which may be operated accessible to the oil derived from lands under such lease, shall at reasonable rates and without discrimination accept and convey the oil of the Government or of any citizen or company not the owner of any pipeline operating a lease or purchasing gas or oil under the provisions of this chapter.

30 U.S.C. § 185(r)(4) (1976).

In providing that lessees who own pipelines must transport the oil of lessees who do not own pipelines, Congress must have assumed that not all lessees are pipeline owners. Because all holders of producing leases by 1973 had some form of on-lease gathering lines and production facilities, the inclusion of those facilities as sec. 28 "pipelines" would have rendered sec. 28(r)(4) superfluous, since there would have been no lessees who were not also pipeline owners. As was pointed out in a case construing sec. 28 prior to its 1973 amendment: "It is a well known maxim of statutory construction that all words and provisions of statutes are intended to have meaning and are to be given effect, and words of a statute are not to be construed as surplusage." *Wilderness Society* v. *Morton*, 479 F.2d 842, 856 (D.C. Cir.), *cert. denied*, 411 U.S. 917 (1973).

Neither the legislative history nor the 1973 changes in sec. 28 contradict the inference created by sec. 28(r)(4) that Congress did not intend on-lease production facilities to require sec. 28 rights-of-way.[15] Although the 1973 amendments broadly define "pipeline" as including "related facilities," none of the examples of "related facilities" set forth in the *statute* are of the type associated solely with the production, as opposed to the transportation, of oil and gas.[16] In addition, nothing in the legislative history indicates that the broad definition of "pipeline" was meant to impose a new permitting regime on oil and gas lease operations. In the only relevant portion of the legislative history of the 1973 amendments, then-Representative Melcher, chairman of the House subcommittee which considered the 1973 amendments, made the following statement in response to an amendment which would have limited "related facilities" to those which were specifically set forth in the statute:

---

[11] Act of Aug. 21, 1935, ch. 599, § 1, 49 Stat. 678.

[12] Act of Aug. 12, 1953, ch. 408, 67 Stat. 557.

[13] Act of Nov. 16, 1973, Pub. L. 93–153, § 101, 87 Stat. 576.

[14] The 1935 amendments made the granting of sec. 28 rights-of-way discretionary and added the requirement that pipelines receiving a right-of-way grant must transport or purchase oil or natural gas produced on federal leases in the vicinity of the pipeline. The 1953 amendments exempted certain natural gas pipelines from the sec. 28 common carrier requirements. Neither the amendments nor their legislative histories give any indication of the intended scope of sec. 28.

> Mr. MELCHER. Mr. Chairman, I rise in opposition to the amendment.
>
> Mr. Chairman, this amendment would confine "related facilities" to those named in section 1(a) which includes valves, pump stations, supporting structures, bridges, monitoring and communication devices, surge and storage tanks, terminals, roads, and campsites. The phrase "but not limited to" was included only to permit inclusion of other necessary but presently unknown "related facilities."
>
> It was not intended to include airports as this was deleted by the subcommittee. *For example secondary feeder or gathering lines from storage tanks are not specifically named but are absolutely necessary for the operation of the pipeline.* This is the type of facility the language is intended to cover. It is not intended to be devious and it is not intended to cover airports. (italics added).

119 Cong. Rec. 27678 (1973).

Although not completely free of ambiguity, Rep. Melcher appears to have been suggesting, as examples of "related facilities," lines leading off-lease to a main pipeline, based on his use of the phrase "*from* storage tanks" and on the technical definition of "feeder lines" and "gathering lines" as lines leading from leases to main pipelines or trunk lines. *See* Williams & Myers, *Manual of Oil and Gas Terms*, 250, 433 (4th ed. 1976) (definitions of "gathering lines" and "pipe line"). Thus Rep. Melcher's statement is consistent with a definition of pipeline (including related facilities) which excludes production facilities.

The foregoing statutory interpretation and legislative history—particularly the 1973 enactment of sec. 28(r)(4)—lead us to the conclusion that sec. 28 was not intended to apply to on-lease production facilities.

---

[15] Although language nearly identical to sec. 28(r)(4) was included in the original sec. 28 of the Act, this inference of Congressional intent was not created in 1920, because, as the House colloquy quoted above indicates, Congress believed when it passed the original 1920 Act that lease operators did not build on-lease production "pipelines." In contrast to the 1920 Act's legislative history, the legislative history of the 1973 amendments does not reflect a lack of Congressional awareness that lease operators universally owned on-lease production facilities such as gathering lines.

[16] Sec. 28(d) states that: "Related facilities include but are not limited to valves, pump stations, supporting structures, bridges, monitoring and communication devices, surge and storage tanks, terminals, roads, airstrips and campsites." [30 U.S.C. § 185(d) (1976).]

It was the Department's 1979 regulations that added "gathering lines" to the definition.

2. *Past Interpretation and Administration by the Department*

The proper scope of sec. 28 would be a closer question if the sole basis for decision were the statutory language and legislative history discussed above. However, a further factor that must be considered is the manner in which the Department has interpreted and administered the Act during the sixty years it has been in force. While not conclusive, the construction given to a statute in the course of its actual execution by an administrative agency is entitled to respect. *Northern Cheyenne Tribe* v. *Hollowbreast*, 425 U.S. 649, 660 (1976); *Udall* v. *Tallman*, 380 U.S. 1 (1965).

Both the official interpretation of the Act by the Department, and its actual administration, generally support our conclusion that sec. 28 does not apply to pipelines and other facilities located on-lease and used for the production—as opposed to the transportation—of oil and gas. This position is clearly set out in Solicitor's Opinion M–36575 (Aug. 26, 1959). In that opinion the Deputy Solicitor responded to questions from the Director of BLM on the subject of "[r]ights of an oil and gas lessee to the use of the surface of the land and surface materials in his lease," and "injury to the land and vegetation by reason of operations under the lease." One of the questions involved "alleged excessive width of surface disturbance in building pipelines." The Deputy Solicitor responded:

> It is assumed that the pipelines referred to are gathering lines constructed by the lessee entirely within the boundaries of the leased lands and not those pipeline rights-of-way authorized by section 28 of the act, as amended. The latter are limited to 25 feet on each side of the area actually occupied by the pipeline. As to the former, the lessee is entitled to use whatever area that is reasonably necessary to construct and maintain the pipelines required.

Solicitor's Opinion M–36575 (Aug. 26, 1959).

Two earlier Departmental decisions lend additional support to this position. *Frances R. Reay, Lessee*, 60 I.D. 366 (1949), held that a sec. 28 right-of-way was necessary for the portion of a gathering line which crossed an off-lease tract of federal land situated between two segments of a lease. On its face, however, the decision did not require a right-of-way for the portions of the line which were on-lease. The decision implied that the right to construct the on-lease portions was contained in the lease, when it based requiring the off-lease right-of-way on the fact that "the lease grants to the lessee no rights in lands outside the subdivisions described in the lease," 60 I.D. at 368. *George W. Harris (on rehearing)*, 53 I.D. 508 (1931), involved the application of sec. 29 of the Act, 30 U.S.C. § 186 (1976).[17]

---

[17] Sec. 29, which remains as it was enacted in 1920, provides as follows:

"Any permit, lease, occupation, or use per-

Although the opinion did not directly focus on sec. 28, its interpretation of sec. 29 was based on the premise that "[a] permittee or lessee is not in need of any easement in connection with land for which he has been given the only permit or lease." 53 I.D. at 510.

The actual administration of the Act during the past sixty years also has been generally consistent with our conclusion that sec. 28 was not intended to apply to on-lease production facilities. We have found no indication that rights-of-way were ever routinely required for such facilities. Indeed, standard form oil and gas leases typically have included a broad grant of rights for necessary surface uses,[18] although such grants are sometimes conditioned by special stipulations or lease terms aimed at ensuring, among other things, proper environmental protection in activities on the lease.

The only decision that militates against our view of sec. 28 and its consistent application by the Department is *Continental Oil Co.*, 68 I.D. 186 (1961). This decision involved an appeal from a denial of rights-of-way for lines to connect with an existing casinghead gas gathering line, for a residue gas fuel line, and for a gas collecting system. The lines were located wholly on federal land under lease to Continental and constituted a part of

---

F.N. 17—Continued

mitted under this chapter shall reserve to the Secretary of the Interior the right to permit upon such terms as he may determine to be just, for joint or several use, such easements or rights-of-way, including easements in tunnels upon, through, or in the lands leased, occupied, or used as may be necessary or appropriate to the working of the same, or of other lands containing the deposits described in this chapter, and the treatment and shipment of the products thereof by or under authority of the Government, its lessees, or permittees, and for other public purposes. The Secretary of the Interior, in his discretion, in making any lease under this chapter, may reserve to the United States the right to lease, sell, or otherwise dispose of the surface of the lands embraced within such lease under existing law or laws hereafter enacted, insofar as said surface is not necessary for use of the lessee in extracting and removing the deposits therein. If such reservation is made it shall be so determined before the offering of such lease. The said Secretary, during life of the lease, is authorized to issue such permits for easements herein provided to be reserved."
30 U.S.C. § 186 (1976).

[18] Sec. 1 of the first oil and gas lease form drawn up by the Department pursuant to the Act stated:

"Section 1. *Purposes.*—That the lessor in consideration of rents and royalties to be paid, and the convenants to be observed as herein set forth, does hereby grant and lease to the lessee the exclusive right and privilege to drill for, mine, extract, remove, and dispose of all the oil and gas deposits in or under the following described tracts of land situated in the county of ———————, State of ———————, and more particularly described as follows: ———————
containing ——— acres, more or less, together with the right to construct and maintain thereupon all works, buildings, plants, waterways, roads, telegraph or telephone lines, pipe lines, reservoirs, tanks, pumping stations, or other structures necessary to the full enjoyment hereof."

BLM Circular No. 672 (*as amended*), 47 L.D. 437, 447 (1920).

A nearly identical grant of rights is contained in sec. 1 of the oil and gas lease forms currently in use. *See* Offer to Lease and Lease for Oil and Gas (Sec. 17 Noncompetitive Public Domain Lease), Form 3110–1, Eleventh Edition (Mar. 1977); Lease for Oil and Gas (Sec. 17 Noncompetitive Public Domain Lease), Form 3110–2 (Feb. 1977); Offer t Lease and Lease for Oil and Gas (Noncompetitive Acquired Lands Lease), Form 3110– (Mar. 1978); Protective Oil and Gas Lease Form 3120–1 (May 1978); Oil and Gas Leas (Competitive Public Domain Lands), Form 3120–7 (Feb. 1977); Oil and Gas Lease Unde the Acquired Lands Mineral Leasing Ac (Future Interest or Competitive), Form 3130 4 (Feb. 1977).

Continental's gathering system which carried casinghead gas from its separators to its gasoline plant. Part of the residue gas from the gasoline plant was used to power Continental's production operations and the remainder was injected underground for pressure maintenance and storage. The decision does not indicate whether all of the lines in question crossed boundaries between Continental's leases, or whether some of the lines were wholly within a single lease; nor does it indicate whether the gasoline plant was processing gas produced by other lessees, which is a common practice. The company applied tor rights-of-way under sec. 29 of the Act, 30 U.S.C. § 186, quoted in note 17 above, apparently to avoid the common carrier requirements of sec. 28. In a decision based largely on the language of sec. 28 itself, the Department held that sec. 28 provided the sole authority for granting rights-of-way for oil and gas pipelines:

> [T]he circumstances present in this case that the lines here under discussion cross only public lands under lease to the appellant and that the appellant contemplates their use only in production operations [do not] alter our conclusion [that sec. 28 applies] * * * [Sec. 28] makes no distinction between lines which cross only lands under lease to the pipeline applicant and lines which may cross lands under lease to others or lines which may cross lands on which there may be no leases nor does it require that the lines be constructed, operated and maintained as common carriers only in the event the lines are to carry oil or natural gas to market.

68 I.D. at 189–90.

In light of the legislative history and Departmental precedent discussed above, however, we find this broad language in the *Continental Oil* decision unpersuasive. First, the decision made no mention of either Solicitor's Opinion M–36575 (Aug. 26, 1959) or *George W. Harris (on rehearing)*, 53 I.D. 508 (1931). *Harris* implied, and Solicitor's Opinion M–36575 directly held, that sec. 28 rights-of-way are not required for on-lease production facilities. Second, the decision in *Continental Oil* applied *Frances R. Reay, Lessee*, 60 I.D. 366 (1949), in an overly broad manner. *Reay* clearly required a sec. 28 right-of-way only for the off-lease portion of a gathering line; it did not speak to the portion that was on-lease. Third, the *Continental Oil* decision failed to discuss the right to construct and maintain production facilites which is granted to a lessee in his lease. Finally, the decision was not in any way respected by the 1973 enactment of sec. 28(r)(4) in Pub. L. 93–153. As discussed above, the enactment of sec. 28(r)(4) strongly implied that Congress did not intend on-lease production facilities to be covered by sec. 28.

For these reasons, we overrule the *Continental Oil* decision to the extent that it is inconsistent with the views expressed herein.

3. *Secretarial Discretion to Control On-Lease Activities*

As the analysis above indicates, sec. 28 is not applicable to on-lease production facilities. Nevertheless, the Secretary does have broad powers under the Act both to provide terms in leases to protect the interests of the United States, 30 U.S.C. § 187 (1976), and to promulgate and enforce regulations protecting those interests. 30 U.S.C. § 189 (1976). Although a lessee's rights are determined by the grants, and the conditions on the grants, in his lease, the Secretary has, under those conditions in the lease and his general regulatory authority, the power to regulate the manner in which the lessee's rights are exercised. *Copper Valley Mach. Works, Inc.* v. *Andrus*, 474 F. Supp. 189 (D.D.C. 1979); Solicitor's Opinion M-36591 (May 9, 1960). As the Court noted in *Copper Valley*, "That the Secretary has the authority and responsibility to protect the environment of public lands within federal oil and gas leases is beyond dispute." 474 F. Supp. at 191. A corollary to the Secretary's regulatory authority is authority to determine the procedural mechanism by which the regulation occurs.

The procedures for regulating on-lease activities established under Secretarial Order 2948 and the BLM-USGS Cooperative Procedures Agreement reserve to the Department the authority to protect the United States legal interests in the property, since the lessor and surface management agency can impose binding stipulations in leases, *see Natural Resources Defense Council, Inc.* v. *Berklund*, 609 F. 2d 553 (D.C. Cir. 1979), in surface use and operations plans, and in authorizations to conduct leasehold operations or construction activities. *See Copper Valley Mach. Works, Inc.* v. *Andrus*, *supra*. The Secretary has broad discretion either to continue this procedure, or to substitute any other delegation of his authority and any other reasonable regulatory procedure which he concludes would equally protect the United States interests.

4. *Authorization to Conduct Off-Lease Activities*

We find no authority for allowing off-lease uses of federal lands for oil and gas production or transportation without following the established procedures for issuing a right-of-way under the appropriate statute. "The lease grants to the lessee no rights in lands outside the subdivisions decribed in the lease." *Frances R. Reay, Lessee*, 60 I.D. 366, 368 (1949).

Depending on the nature of the facility, the right-of-way would be granted pursuant to either sec. 28, 30 U.S.C. § 185 (1976), or Title V of FLPMA, 43 U.S.C. §§ 1761-1771 (1976)).[10]

---

[10] Sec. 28 applies to pipelines (including related facilities) "for the transportation of oil, natural gas, synthetic liquid or gaseous fuels, or any refined production produced therefrom." 30 U.S.C. § 185(a) (1976). Title V applies to a broad range of other facilities, as set forth in sec. 501(a) of FLPMA, 43 U.S.C. § 1761(a) (1976).

5. *Authorization for On-Lease "Commercial" Facilities*

Oil and gas leases do not authorize parties other than the lessee or operator to own and operate on-lease facilities; nor do they authorize a lessee or operator to construct and operate facilities to serve production from outside his lease or unit, regardless of whether such facilities also serve production from his own lease or unit. Such commercial operations can be authorized only by an appropriate right-of-way grant.

CONCLUSION

Based on the foregoing analysis, we conclude that sec. 28 of the Mineral Lands Leasing Act does not apply to on-lease production facilities which are included in a surface use and operations plan, and which are authorized by the approval of an application to conduct leasehold operations or construction activities. We believe that a reasonable dividing point between "production" and "transportation" is the point at which the lease operator completes his final processing or storage of the product or, in the case of gas, the point of delivery to the transportation pipeline. Thus "production facilities" include an operator's storage tanks and processing equipment, and oil and gas pipelines upstream from any of the operator's tanks and equipment or, in the case of gas, upstream from the point of delivery. "Production facilities" also include pipelines and equipment which are used in the production process for purposes other than carrying oil and gas downsteam from the well head. Examples of this latter type of production facility are water disposal lines and gas or water injection lines. Although sec. 28 does not apply to on-lease production facilities, the Secretary has broad power to regulate all on-lease activities, including the construction and operation of production facilities, and to determine the procedural mechanism by which that regulation occurs.

Off-lease facilities, regardless of their nature, on-lease oil and gas transportation facilities, and on-lease "commercial" facilities as defined in sec. 5, above, can be authorized only by an appropriate right-of-way grant.

It follows from this that the regulations published at 44 FR 58126 (Oct. 9, 1979) should be modified as necessary to bring them into conformity with this opinion.

This opinion was prepared by James B. Weber, Attorney, Solicitor's Honors Program, with the assistance of John D. Leshy, Associate Solicitor, Energy and Resources; Lawrence G. McBride, Assistant Solicitor, Onshore Minerals; John J. McHale, Assistant Solicitor, Realty; David Grayson, Assistant Solicitor, Land Use; and the Solicitor.

Clyde Martz
Solicitor

I concur:

Cecil D. Andrus
Secretary of the Interior

ISLAND CREEK COAL CO.

2 IBSMA 125

Decided *July 3, 1980*

Appeal by Island Creek Coal Co. from that part of a Jan. 7, 1980, decision by Administrative Law Judge Tom M. Allen upholding Violation No. 1 of Notice of Violation No. 79–II–18–39 (Docket No. NX–0–1–R).

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Notice of Violation: Specificity

A notice of violation containing an improper citation to the regulations is reasonably specific where the narrative description of the alleged violation accurately notifies the permittee of the nature of the alleged violation.

2. Surface Mining Control and Reclamation Act of 1977: Spoil and Mine Wastes: Downslope—Surface Mining Control and Reclamation Act of 1977: Words and Phrases

"Downslope." The downslope in a multiple seam mining operation is the land surface between a valley floor and the projected outcrop of the lowest coalbed being mined along each highwall, not the area between a valley floor and the projected outcrop of the lowest coalbed under permit.

APPEARANCES: George S. Brooks II, Esq., Lexington, Kentucky, for Island Creek Coal Co.; Charles P. Gault, Esq., Office of the Field Solicitor, Knoxville, Tennessee, and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Division of Surface Mining, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

Island Creek Coal Co. (Island Creek) has appealed from that part of Administrative Law Judge Tom M. Allen's Jan. 7, 1980, decision upholding Violation No. 1 in Notice of Violation No. 79–II–18–39. Violation No. 1 was described in the notice as a violation of "30 CFR 716.2(a)(1)" for "allowing spoil material to remain on the downslope."[1] For the reasons stated below the Administrative Law Judge's decision is affirmed.

Procedural Background

On Aug. 28, 1979, an Office of Surface Mining Reclamation and Enforcement (OSM) inspector visited the 1–J and 1–U surface coal mines of Island Creek in Martin County, Kentucky. The next day he issued Notice of Violation No. 79–II–18–39, which alleged five sep-rate violations of the initial Federal program performance standards.[2]

---

[1] Sec. 716.2(a)(1), as published in 42 FR 62639, 62692 (Dec. 13, 1977), reads as follows: "Spoil, waste materials or debris, including that from clearing and grubbing, and abandoned or disabled equipment, shall not be placed or allowed to remain on the downslope." While the text of that section remains the same, it was renumbered when codified in 30 CFR 716.2(a). All further references are to the numbering in 30 CFR.

Island Creek sought review of the notice, and, following a hearing held on Nov. 16, 1979, the Administrative Law Judge issued his decision on Jan. 7, 1980. Island Creek filed a timely notice of appeal with the Board and in its brief indicated that it was appealing only that portion of the decision relating to Violation No. 1.

Discussion

With respect to Violation No. 1 there is no material dispute concerning the following facts. When the OSM inspector visited Island Creek's 1-U mine, which was a mountaintop removal operation, he observed spoil material consisting of rocks and boulders on a slope 50 to 75 feet below the projected outcrop of the lowest coal seam being mined (Tr. 10–12, 15–16, 20; Exhs. R–3 through R–7). It was explained to him by an employee for Rebel Coal Corporation, Island Creek's contract miner at the site, that the material had moved down the slope during blasting operations (Tr. 15–16). The inspector cited Island Creek for allowing spoil material to remain on the downslope in violation of 30 CFR 716.2(a).

Island Creek has correctly observed that the OSM inspector improperly cited 30 CFR 716.2(a). 30 CFR 716.2 specifically exempts mountaintop removal mining from its coverage.[3] OSM admits that the citation of the regulation was incorrect and states that 30 CFR 716.3 (b)(5) would have been the proper cite.[4]

Island Creek argues that failure to cite the particular regulation allegedly violated renders the notice of violation invalid; OSM characterizes the incorrect citation as harmless error.

Sec. 521(a)(5) of the Surface Mining Control and Reclamation Act of 1977 (Act)[5] requires that notices of violation "shall set forth with reasonable specificity the nature of the violation and the remedial action required." Where regulations are complicated and remedies may be quite expensive, as is true under the Act, general guidance is not enough. The notice of violation must set forth the required information clearly; incorrect citations to the provisions of the regulations allegedly violated or inaccurate descriptions of the nature of the violation are both potentially misleading.

---

[2] 30 CFR Parts 715 and 716.

[3] 30 CFR 716.2 states: "The standards of this section do not apply * * * where the mining is governed by § 716.3" [Mountaintop removal].

[4] 30 CFR 716.3(b)(5) reads:

"Spoil shall be placed on the mountaintop bench as is necessary to achieve the postmining land use approved under § 715.13 of this chapter. All excess spoil material not retained on the mountaintop shall be placed in accordance with the standards of § 715.15 of this chapter."

[5] Act of Aug. 3, 1977, 91 Stat. 445, 506, 30 U.S.C. § 1271(a)(5) (Supp. I 1977).

[1] In *Old Ben Coal Co.*, 2 IBSMA 38, 87 I.D. 119 (1980), where OSM attempted to establish a violation other than that cited and described in the notice of violation, we vacated the notice of violation for failure to conform to the requirements of sec. 521(a)(5).[6] The failure of the OSM inspector to cite the proper subsection of the regulations in the notice of violation issued to Island Creek in this case, however, is not fatal. Such a mistake may be corrected by the narrative description of the alleged violation in the notice.

In this case the inspector described the nature of the violation as "allowing spoil material to remain on the downslope." The question is whether this narrative is a reasonably specific description of a violation. It definitely describes a violation of the steep slope mining regulations of 30 CFR 716.2; however, since the surface mining in question is a mountaintop removal operation, 30 CFR 716.2 is not applicable. Instead, the mountaintop removal regulations of 30 CFR 716.3 apply. While the description does not parrot the exact language of 30 CFR 716.3(b)(5), it does describe the condition—spoil on the downslope—which violates the requirements of 30 CFR 716.3(b)(5). Moreover, the possibility of a doubt concerning the adequacy of notice in this case vanishes in the absence of any evidence that Island Creek was confused about the nature of the alleged violation. Unlike the operator in *Old Ben*, Island Creek has made no claim that it was misled by the terms of the notice of violation, nor has it contended that it did not know the nature of the alleged violation and what was needed to abate it. Its argument is technical in nature; it is based entirely on the incorrect citation.

The next question is whether the condition which existed constituted a violation of the regulations.

[2] Island Creek argues that there could not be a violation because the spoil was not located on the "downslope." The basis for its argument is that a lower coal seam (Stockton) exists at a lower elevation than the area in question, and that the Stockton seam is under permit to be mined. Island Creek asserts that there should be a distinction drawn between "outslope" and "downslope" in a multi-

---

[6] In *Old Ben* both the citation of the regulation allegedly violated and the verbal description of the alleged violation indicated that OSM was concerned about the quality of the discharge from a sedimentation pond. During the hearing before the Administrative Law Judge, however, OSM for the first time stipulated that the discharge from the pond met the effluent limitations and then attempted to prove a violation below the point of discharge from the pond. Before the Board, OSM argued that the violation it sought to prove was incorporated by reference in the violation cited and that this incorporation made the operator responsible for the quality of all discharges until they reached a point of ultimate dispersion into the natural environment. We rejected this argument and held that the notice of violation did not meet the requirements of sec. 521(a)(5). We did not hold that a citation of a subsection, such as 30 CFR 715.17(a) or even 30 CFR 715.17, without a specification of the particular part of the subsection violated, was unreasonable lack of specificity. Neither did we hold that an incorrect citation with an accurate verbal description of the violation was not reasonably specific.

ple seam mining operation.[7] Under Island Creek's theory there can be only one downslope, the one below the lowest coal seam under permit. All other slopes from benches created by mining seams at a higher level would be outslopes. It characterizes the slope in question as an outslope under this theory.

We do not agree. Initially, there is no evidence, other than the inspector's belief (Tr. 33), that the Stockton seam is under permit. And, even if it is under permit, that is no guarantee that the seam will be mined. In any event the definition of downslope refers in clear terms to the lowest coalbed being mined, not the lowest coalbed under permit.

For the above stated reasons, we hold that Island Creek violated the initial Federal program special performance standards, specifically 30 CFR 716.3(b)(5), by allowing spoil material to remain on the downslope. Therefore, we affirm that part of the Administrative Law Judge's decision relating to Violation No. 1 of Notice of Violation No. 79–II–18–39.

Will A. Irwin
Chief Administrative Judge

Newton Frishberg
Administrative Judge

ADMINISTRATIVE JUDGE MIRKIN DISSENTING:

The majority holds that, because the narrative description of the notice of the violation sets forth the facts of violation, OSM is to be excused from having cited a different regulation from the one that was described as having been violated. It states that "the possibility of a doubt concerning the adequacy of notice in this case vanishes" because Island Creek was not misled; that it in fact knew the nature of the alleged violation (*supra*, at 306).

30 U.S.C. § 1271(a)(5) (Supp. I 1977) in terms requires a notice of violation to "set forth with reasonable specificity the nature of the violation." In *Old Ben Coal Co.*, 2 IBSMA 38, 87 I.D. 119 (1980), we declined to waiver from that requirement. Here we are starting to say that the formal notice may be a little deficient so long as there is actual knowledge of the violation. That is to equate notice with knowledge and I do not believe that is correct. The operator can acquire knowledge of his alleged violation in a number of ways, but actual knowledge is not necessarily the notice envisioned by the statute. The knowledge that should be required by us is that knowledge which is had or imputed by virtue of having been served with a notice of violation that has been prepared in the prescribed manner.[1] What is re-

---

[7] 30 CFR 710.5 states: "*Downslope* means the land surface between a valley floor and the projected outcrop of the lowest coalbed being mined along each highwall."

"*Outslope* means the exposed area sloping away from a bench or terrace being constructed as a part of a surface coal mining and reclamation operation."

[1] *See Chapman* v. *Chapman*, 118 Vt. 120, 100 A.2d 584 (1953); *National Metal Co.* v. *Greene Consol. Copper Co.*, 11 Ariz. 108, 89 P. 535 (1907); *Bird* v. *McGuire*, 216 Cal. App. 2d 702, 31 Cal. Rptr. 386 (1963) (for a listing

quired is a review that is conducted in the manner prescribed by Congress.[2]

OSM argues that knowledge equals notice and the notice of violation is adequate because Island Creek knew what it was being charged with even though the regulation cited was not one it had violated. This argument, factually accurate though it may be, would be more convincing had not OSM in its response to comments on the proposed permanent rules and regulations stated that "a notice of violation which did not specify the appropriate section would not meet the requirements of Section 843.12 (b)(1)."[3] Although certainly not conclusive of how this Board should construe either the permanent or interim regulations, those comments are of at least passing interest in evaluating the arguments adduced in this matter.

Where a notice of violation on its face states a violation of the law, the next move is up to the permittee.[4] If no objection is timely made to the Administrative Law Judge, such objection would normally be waived. Timely objection was made below. After proper objection is made, OSM should be given an opportunity to amend (and the permittee whatever additional opportunity may be required to defend). But where, after timely objection and an opportunity to amend, OSM chooses to stand on the improper notice, the permittee should be entitled to a dismissal of the notice of violation. Here, we do not know what OSM would have done because the Administrative Law Judge believed he was obligated to accept the faulty notice (Tr. 31). That error does not correct the one of OSM. Island Creek is entitled to a remand so that the process can be corrected. It could then make its own determination as to whether the matter is worth pursuing further. For these reasons alone I dissent.

Melvin J. Mirkin
Administrative Judge

CRAVAT COAL CO.

2 IBSMA 136

Decided *July 3, 1980*

Appeal by the Office of Surface Mining Reclamation and Enforcement from the

---

F.N. 1—Continued
of the California authorities in agreement). That this Board should maintain a posture of requiring OSM to adhere to the prescriptions of the Congress and the Secretary in preparing notices of violation is supported by its insistence on conformity to those legal prescriptions by those who try to deviate from the specified manner of doing things. On more than one occasion we have held that "just as good as" does not excuse an operator from compliance with the law. *See Alabama By-Products Corp.*, 1 IBSMA 239, 86 I.D. 446 (1979); *Carbon Fuel Co.*, 1 IBSMA 253, 86 I.D. 485 (1979); *White Winter Coals, Inc.*, 1 IBSMA 305, 86 I.D. 675 (1979).

[2] As observed by a court of appeals in a comparable situation, a reviewing authority should not "allow important issues of law and public policy to be decided in a patchwork of legal theory that is sewn in a confusion inconsistent with responsible review." *Hess & Clark, Division of Rhodia, Inc.* v. *Food & Drug Admin.*, 495 F.2d 975, 990 (D.C. Cir. 1974).

[3] 44 FR 15302 (Mar. 13, 1979). 30 CFR 843.12(b) restates some of the requirements of 30 U.S.C. § 1271(a)(5) (Supp. I 1977).

[4] If a permittee is content with a citation to a regulation without descriptive facts or vice versa, that is its business. A motion to dismiss or to make more definite and certain then makes it the business of the Hearing Division.

Feb. 11, 1980, decision of Administrative Law Judge Sheldon L. Shepherd (Docket No. IN 0–4–R) vacating Cessation Order No. 79–III–18–3 issued to Cravat Coal Co. for its alleged failure to abate a violation of 30 CFR 715.17(l)).

Vacated in part and remanded.

1. Surface Mining Control and Reclamation Act of 1977: Hearings: Notice

Parties are entitled to written, advance notice of the time, place, and nature of a hearing to review a cessation order, in accordance with the provisions of 43 CFR 4.1123(b) and 4.1167.

APPEARANCES: John C. McDowell, Esq., Field Solicitor, and Myra P. Spicker, Esq., Office of the Field Solicitor, Indianapolis, Indiana; Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Office of the Solicitor, Washington, D.C., all for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

This appeal was brought by the Office of Surface Mining Reclamation and Enforcement (OSM) from the Feb. 11, 1980, decision of the Hearings Division, in Docket No. IN 0–4–R, vacating Cessation Order No. 79–III–18–3. OSM issued the cessation order to Cravat Coal Co., Inc. (Cravat), on Nov. 14, 1979, for its alleged failure to abate a violation of 30 CFR 715.17(*l*) within the time period prescribed in Notice of Violation No. 79–III–4–12, as modified.

On appeal OSM has argued that the Administrative Law Judge could not properly grant Cravat permanent relief from the cessation order because the parties were not notified of his intention of ruling finally on the merits of the order. We agree with OSM that under the circumstances of this case the granting of permanent relief was improper and, therefore, we hereby vacate the decision, in part, and remand the case for further proceedings.

Factual and Procedural Background

On Jan. 21, 1980, Cravat filed an application for temporary relief from the affirmative obligations imposed by OSM in Cessation Order No. 79–III–18–3. A notice that the application would be heard was issued on Jan. 23, 1980. The scope of the hearing was described in the notice: "The hearing will be for the purpose of receiving oral testimony under oath and documentary evidence on all material issues affecting the application for temporary relief. The matters of fact and law are those raised in the cessation order and the pleadings."

On Feb. 8, 1980, the hearing of Cravat's application for temporary relief occurred. At the beginning of this proceeding the Administrative Law Judge reiterated its purpose: "The matter before us today is the Cravat Coal Company, Applicant, versus the Office of Surface Mining Reclamation and Enforcement, Docket Number IN 0–4–R, on the Request For Temporary Relief From Cessation Order Number 79-III-18-3" Tr. 4). Despite this description of the hearing as a proceeding to review Cravat's application for temporary relief, the decision issued on Feb. 11, 1980, vacated Cessation Order No. 79-III-18-3. OSM filed an appeal on Mar. 14, 1980, which it supported with a brief filed on Apr. 14, 1980. Cravat did not file a brief.

Issue Presented

The issue presented is whether it was improper for the Administrative Law Judge to vacate Cessation Order No. 79-III-18-3 on the basis of the proceeding to review Cravat's request for temporary relief from the affirmative obligations imposed under that order.

Discussion

By vacating the cessation order issued to Cravat by OSM, the Administrative Law Judge rendered a final decision on its merits. OSM argues on appeal that this decision constituted a denial of administrative due process because it was based on a proceeding to review Cravat's application for temporary relief and, thus, the parties were not forewarned of the need to prepare and present a full case on the merits of the cessation order. We agree.

[1] Under the Department's procedural regulations it is required that parties be informed of the time, place, and nature of a hearing to review a cessation order.[1] Except in expedited review and temporary relief proceedings, the notice is to be provided in writing 5 working days prior to the hearing.[2] These notice requirements pertain even when review of a request for temporary relief is consolidated with final review of the merits.[3]

The parties were duly appraised of the hearing to review Cravat's application for temporary relief by the Administrative Law Judge's written notice issued on Jan. 23, 1980. However, there is no indication in the record of any notice to the parties of his intention of ruling finally on the merits of the cessation order. Moreover, the arguments of counsel at the hearing and in their proposed findings of fact and conclusions of law demonstrate their understanding that the hearing was to be conducted for the limited purpose of reviewing Cravat's request for temporary relief.[4] Under these

---

[1] 43 CFR 4.1123.

[2] 43 CFR 4.1123(b); 43 CFR 4.1167.

[3] Consolidation of proceedings is authorized under the Department's procedural regulation when there is a common issue of law or fac involved. 43 CFR 4.1113. Consolidation ma occur pursuant to a motion by a party or a the initiation of the Administrative Lav Judge. *Id.*

The Board views 43 CFR 4.1113 as author izing consolidation of a proceeding to review a request for temporary relief from a cessatio order with one to review finally the merits o the order. *Cf.* Fed. R. Civ. P. 65(a)(2 (authorizing consolidation of the trial on th merits with the hearing of an application fo a preliminary injunction). However, such con solidation may not occur without prior notic to the parties in accordance with the notic provisions of the Department's regulation and unless there is such notice and consolida tion an Administrative Law Judge may no rule finally on the merits of the cessatio order in response to an application for tem porary relief.

[4] In his closing argument, counsel for Crava stated:

"I would just like to point out to your Hono that again the reason we have filed this Appl cation for Temporary Relief is that we fe that when the Court hears the matter in ful and we do have other evidence that we woul circumstances the parties were not afforded sufficient opportunity to prepare and present fully their cases on the merits of the cessation order.

On the basis of the foregoing the Board hereby vacates that portion of the decision below granting permanent relief from Cessation Order No. 79–III–18–3. The case is remanded to the Hearings Division so that the record may be reopened for the consideration of further evidence. In this regard, it shall be unnecessary for the parties to resubmit evidence of facts proven in the initial hearing. Pending a final ruling which takes into account any new evidence, the decision of Feb. 11, 1980, shall operate to provide Cravat with temporary relief from the affirmative obligations imposed by OSM under Cessation Order No. 79–III–18–3.[5]

Melvin J. Mirkin
Administrative Judge

Will A. Irwin
Chief Administrative Judge

Newton Frishberg
Administrative Judge

F.N. 4—Continued
present at that time, that there is a good likelihood that the Court will accept our position and relieve us from this N.O.V. and the C.O. [Tr. 62–63]."

In the Proposed Findings of Fact and Conclusions of Law submitted to the Administrative Law Judge by counsel for OSM, the issue in the proceeding was described as: "Whether Applicant is entitled to temporary relief pursuant to Section 525(c) of the Surface Mining Control and Reclamation Act of 1977."

[5] We read the decision vacating the cessation order to reflect implicitly the determination of the Administrative Law Judge that entitlement to temporary relief was demonstrated by Cravat; OSM has not argued on appeal that such relief is unfounded.

ESTATE OF VICTOR YOUNG BEAR

8 IBIA 130

Decided *July 24, 1980*

Appeal from an order by Administrative Law Judge Garry V. Fisher determining, inter alia, that the decedent was survived by a daughter legally adopted through action of the Fort Berthold Superintendent and by an illegitimate daughter.

Reversed in part; affirmed in part:

1. Indian Probate: Adoption: Generally

One who participated in an adoption proceeding has no standing to object that some other person was deprived of his or her constitutional rights.

2. Indian Probate: Adoption: Generally

Where the jurisdictional invalidity of an Indian adoption granted by an officer of the Bureau of Indian Affairs appears on the face of the record, the judgment is open to attack, direct or collateral, at any time.

3. Indian Probate: Adoption: Generally

The Supreme Court's ruling in *Fisher v. District Court of the Sixteenth Judicial District of Montana*, 424 U.S. 382 (1976), makes it clear that 25 U.S.C. § 372a (1976) is not a statute which bestows authority to grant adoptions. The Act of July 8, 1940, simply provides that the Secretary of the Interior may rely on adoptions legally consummated under other specific authority in the course of performing the probate functions conferred on him by Congress.

4. Indian Probate: Children, Illegitimate: Generally—Indian Probate: Evi-

dence: Generally—Indian Probate: Hearing: Full and Complete

The Administrative Law Judge held a full and complete hearing on the issue of decedent's possible paternity of Stephanie Young Bear and his finding that she was conceived by decedent through criminal intercourse with his purported daughter by adoption was supported by a preponderance of the evidence.

APPEARANCES: James P. Fitzsimmons, Esq., for appellant; Janet C. Werness, Esq., for appellee Theresa Bluhm.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

INTERIOR BOARD OF INDIAN APPEALS

Victor Young Bear, deceased Hidatsa allottee No. 2232, died intestate at Hardin, Montana, on July 12, 1973, possessed of trust property located on the Fort Berthold Indian Reservation in North Dakota. On Aug. 8, 1979, Administrative Law Judge Garry V. Fisher entered an Order Determining Heirs in which he found decedent's lawful heirs to be: Alice Young Bear as surviving spouse; Theresa Bluhm as an adopted daughter; and Stephanie Young Bear as an illegitimate daughter.

Alice Young Bear petitioned for rehearing on Sept. 6, 1979, contending that the Administrative Law Judge erred in not proclaiming her to be decedent's only lawful heir. The petition was denied by Judge Fisher by order dated Sept. 12, 1979. A timely appeal from Judge Fisher's order denying rehearing was filed by Alice Young Bear, through counsel, on Sept. 27, 1979. The appeal was docketed by the Board on Oct. 16, 1979.

Background

Theresa Bluhm,[1] an enrolled member of the Three Affiliated Tribes of the Fort Berthold Indian Reservation, was born Jan. 9, 1940, to Jack Lone Fight, Sr., deceased Fort Berthold allottee, and Alvina Recette, an enrolled Sioux Indian of the Fort Peck Reservation in Montana, also deceased. This family including other children, lived together for a while on the Fort Berthold Reservation. However, domestic problems developed between Theresa's parents, and sometime after her birth and before December 1944, Alvina Recette returned to Fort Peck.

In December 1945, Theresa was taken into the home of Victor Young Bear, decedent herein, and his wife, Alice Young Bear, the appellant. The Young Bears lived on the Fort Berthold Reservation; Victor was enrolled at Fort Berthold; Alice Young Bear, a Chippewa Indian, Turtle Mountain Reservation, was adopted at an early age by a Fort Berthold family and thereafter raised on the Fort Berthold Reservation.

On Dec. 26, 1945, Fort Berthold Superintendent C. H. Beitzel signed a document which the Administrative Law Judge has characterized as a formal approval of an Indian adoption effected under provisions of 25 U.S.C. § 372a (1976).[2]

---

[1] Theresa Bluhm is a name acquired by marriage. It is the name by which Theresa identified herself as a witness. Tr. of Aug. 30, 1978, hearing at 19.

The "instrument of adoption" relied upon by the Administrative Law Judge contains the signed statements of Victor Young Bear and Alice Young Bear that they desired to adopt "Theresa Lone Fight" as well as the signed consent of Jack Lone Fight, Sr., Theresa's natural father, to such an adoption. The Dec. 26, 1945, instrument does not contain thereon the signature of Theresa's natural mother, Alvina Recette.[3] However, it refers to an attached statement signed by Alvina as evidence of her consent to Theresa's adoption. The foregoing attached statement to the "instrument of adoption" is dated Dec. 26, 1944. As written, it states as follows:

---

[2] Act of July 8, 1940, c. 555, §§ 1, 2, 54 Stat. 746. The statute provides:

"[Sec. 1] [I]n probate matters under the exclusive jurisdiction of the Secretary of the Interior, no person shall be recognized as an heir of a deceased Indian by virtue of an adoption—

"(1) Unless such adoption shall have been—

"(a) by a judgment or decree of a State court;

"(b) by a judgment or decree of an Indian court;

"(c) by a written adoption approved by the superintendent of the agency having jurisdiction over the tribe of which either the adopted child or the adoptive parent is a member, and duly recorded in a book kept by the superintendent for that purpose; or

"(d) by an adoption in accordance with a procedure established by the tribal authority, recognized by the Department of the Interior, of the tribe either of the adopted child or the adoptive parent, and duly recorded in a book kept by the tribe for that purpose; or

"(2) Unless such adoption shall have been recognized by the Department of the Interior prior to the effective date of this Act or in the distribution of the estate of an Indian who had died prior to that date: *Provided*, That an adoption by Indian custom made prior to the effective date of this Act may be made valid by recordation with the superintendent if both the adopted child and the adoptive parent are still living, if the adoptive parent requests that the adoption be recorded, and if the adopted child is an adult and makes such a request or the superintendent on behalf of a minor child approves of the recordation.

"Sec. 2. This Act shall not apply with respect to the distribution of the estates of Indians of the Five Civilized Tribes or the Osage Tribe in the State of Oklahoma, or with respect to the distribution of estates of Indians who have died prior to the effective date of this Act."

[3] The "instrument of adoption" dated Dec. 26, 1945, is reprinted below:

111667

"Acceptable form for use in Adoption of a minor under the provisions of the Act of July 8, 1940 (Public No. [*sic*] 773—76th Congress.)

"The undersigned, *Victor Youngbear* Allottee No. *2232*, and *his Wife, Alice (Bradford) Youngbear* Allottee No. *None*, of the (*Chippewa*) Reservation in the State of *North Dakota* desiring to adopt *Theresa Lone Fight*, Allottee No. *Unal–1158*, a minor born on or about the *9th* day of *January*, 19*40*, do by these presents agree to and do hereby adopt said minor with the understanding that such adopted child shall have the same rights as if it were their own child, and shall be entitled to all the rights of ingeritance [*sic*] as if it were their natural child. I or we are related to said minor as follows *We are not related to this child*, and the reasons for adopting said minor are as follows: *The mother of the child has deserted the family, and since we do not have any children wish to adopt the within named child, and have her name changed to Youngbear instead of Lonefight*.

"And the undersigned *Jack Lonefight* Allottee No. *1200*, and *Vina Lonefight* (*Recette*) *See attached statement signed by her*. Allottee No. *Ft. Peck All.* parents or natural guardian of said minor do by these presents hereby consent to the adoption of said minor by the parties first hereinabove named.

"I or we are related to said minor as follows: *Parents of Theresa Lone Fight* and I or we have consented to this adoption for the following reasons: *Unable to give the child a good home*.

(VICTOR YOUNGBEAR)
(ALICE YOUNGBEAR)
x /s/ *Victor Young Bear*
x /s/ *Alice Young Bear*
Adoptive parent or parents
/s/ *Jack Lone Fight Sr*
Jack Lonefight, father

"The foregoing adoption is hereby approved pursuant to the provisions of the Act of Congress of July 8, 1940 (—— Stat. ——), this *26* day of *Dec*, 19*45*.

/s/ *C. H. Beitzel*
Superintendent of the
Fort Berthold Indian Agency"

> Fort Peck Agency
> Poplar, Montana
> December 26, 1944
>
> TO WHOM IT MAY CONCERN:
>
> Chief of Police James Archdale have shown me a letter today from Supt. C. H. Beitzel of the Ft. Berthold Agency Elbowoods, North Dakota where Mr. Jack Lone Fight my husband desired my consent to an agreement so my children one Ellison Lone Fight age 8 years old and Carrie Lone Fight age 6 years old and Theresa Lone Fight age 4 years old so that they can be adopted out.
>
> I herewith consent and sign this agreement & accordingly as I understand it, provided that anytime in the future I feel qualified, under the circumstances and competent to take one or all three of them I shall do so if sufficient proof is furnished by me and that my right as their mother is recognized.
>
> VINA RECETTE
>
> Witnesses
> James Archdale
> Chief of Police
> Rose Archdale

Theresa stayed with the Young Bears for approximately 8 or 9 years during which time she attended school at Marty, South Dakota. She spent her summers with the Young Bears. When admitted to school and while receiving different services through the Bureau of Indian Affairs, Theresa was known as Theresa Young Bear.

At various times Theresa ran away from her home with the Young Bears. Alice Young Bear once attempted to relinquish custody of Theresa but she was prevailed upon by Agency officials to keep her in her home.

In 1956 Victor Young Bear was convicted of raping Theresa on June 26, 1954. He was incarcerated as a result of this conviction. Coincidental with the conviction of Victor Young Bear, Theresa left the Young Bear household and never returned.

On Apr. 16, 1955, Theresa gave birth to a daughter, Stephanie. Theresa claims Victor Young Bear is the father of Stephanie and the Administrative Law Judge so found in the proceedings below.

Issues on Appeal

In her notice of appeal dated Sept. 24, 1979, Alice Young Bear contends that the Administrative Law Judge erred in determining that Theresa Bluhm was legally and validly adopted by the decedent. Appellant further contends that the Administrative Law Judge had no authority nor sufficient evidence to make the determination that Stephanie Young Bear is the daughter of the decedent.

Discussion and Conclusions of Law

I. The Adoption Question

Appellant claims the Superintendent of the Fort Berthold Agency did not possess legal authority to grant an adoption of Theresa Bluhm in 1945 and that, absent such authority, the purported adoption is void and without legal effect.

[1] As one of the "adopting parents" who signed a statement in 1945 expressing the desire to adopt Theresa as her own child,[4] it is arguable that appellant should not have standing over 30 years later to challenge the adoption in a probate proceeding where her own interests are presumably self-served. Were it merely asserted by appellant that irregularities were committed in an otherwise lawful Departmental adoption proceeding, including such severe error as failure to obtain the required consent of one of the natural parents—as may well have occurred in the case at bar—the Secretary could readily dismiss such an attack for lack of standing by the complaining party. It is the generally accepted rule that those who participated in an adoption proceeding have no legal right to object that some other person was deprived of his or her constitutional rights. *In re Smith's Estate*, 86 Cal. App. 2d 456, 195 P.2d 842 (1948); 2 Am. Jur. 2d *Adoption* § 72 (1962). *See also Estates of Morgan Black and Mary Grant Black*, 5 IBIA 219, 225 (1976).

[2, 3] In the case before us, however, it is a main contention of appellant that the Superintendent's adoption action constitutes a void judgment open to attack in any proceeding, direct or collateral, where, as here, the jurisdictional invalidity appears on the face of the record.[5]

The Board is persuaded that it has the authority and legal duty in this case to declare the Superintendent's adoption action null and void. This decision is required in light of the Supreme Court's holding in *Fisher* v. *District Court of the Sixteenth Judicial District of Montana*, 424 U.S. 382 (1976). There, the Court was called upon to review a decision of the Montana Supreme Court which held that a lower state court had jurisdiction over the adoption of an Indian child on the Northern Cheyenne Indian Reservation in Montana. The Montana Supreme Court read 25 U.S.C. § 372a (1976) as a congressional grant of jurisdiction over reservation adoptions to state courts, just as the Administrative Law Judge in the case at bar viewed the Act as a grant of jurisdiction to the Bureau of Indian Affairs over reservation adoptions. *Cf.* 25 U.S.C. § 372a(1)(a) and (1)(c) (1976). In reversing the Montana Supreme Court's ruling, the Court stated in *Fisher:*

> 25 U.S.C. § 372a manifests no congressional intent to confer jurisdiction upon state courts over adoptions by Indians. The statute is concerned solely with the documentation necessary to prove adoption by an Indian in proceedings before the Secretary of the Interior. It recog-

---

[4] In the proceedings below, appellant testified that she and decedent never intended to adopt Theresa and that her understanding of the document signed by her on Dec. 25, 1945, was that she agreed to assume custody of Theresa. Tr. of Aug. 30, 1978, hearing at 50–51. From the record as a whole, we think appellant's intent in 1945 was to formally adopt Theresa as her daughter. To this extent we uphold the findings and conclusions of the Administrative Law Judge in his Order Determining Heirs dated Aug. 8, 1979, at 2–3.

[5] Appellant's Brief filed Nov. 19, 1979, at 8, citing 46 Am. Jur. 2nd 347–49 (1969).

> nizes adoption "by a judgment or decree of a State court" as one means of documentation but nowhere addresses the jurisdiction of state courts to render such judgments or decrees. The statute does not confer jurisdiction upon the Montana courts. [Footnote omitted.]

424 U.S. 382, 388–89.

The Supreme Court's ruling in *Fisher* makes it clear that 25 U.S.C. § 372a (1976) is not a statute which bestows authority to grant adoptions. The Act simply provides that the Secretary of the Interior may rely on adoptions legally consummated under other specific authority in the course of performing the probate functions conferred on him by Congress. *See* 25 U.S.C. §§ 372–73 (1976). For example, under the Act of Mar. 3, 1931, 46 Stat. 1494, the Superintendent of the Crow Indian Agency is specifically authorized to approve Indian adoptions on the Crow Reservation in Montana. *See* 25 CFR 11.29C; *Estate of Walks With A Wolf*, 65 I.D. 92 (1958). In short, Indian adoptions accomplished by the Superintendent of the Crow Agency pursuant to the Act of Mar. 3, 1931, *supra*, or by any other superintendent pursuant to statute, typify the nature of adoption referred to by Congress in sec. 1(1)(c) of the Act of July 8, 1940.[6] *See* n.2, *supra*.

Appellant submits that the BIA adoption at issue in this appeal is also void because exclusive jurisdiction over the matter rested with the Three Affiliated Tribes of the Fort Berthold Reservation by virtue of their acceptance of the Indian Reorganization Act of June 18, 1934, 48 Stat. 984, 25 U.S.C. §§ 461–79 (1976), and the Secretary's approval of the tribes' Code of Laws, adopted Dec. 9, 1943, which contains provisions concerning adoption.[7]

Since we have ruled that the purported adoption of Theresa Bluhm by appellant and decedent is null and void because the Fort Berthold Superintendent had no authority to grant such an adoption, it is not necessary that the Board determine whether the Three Affiliated Tribes possessed sole jurisdiction over her adoption in 1945. (Unlike *Fisher*, *supra*, in which the Supreme Court held that the Northern Cheyenne Tribe possessed exclusive jurisdiction over an adoption proceeding among reservation Indians, in the case before us an apparent indispensable party to the adoption proceeding, Theresa's natural mother, neither lived on the reservation at the time of the adoption nor was she a member of the Three Affiliated Tribes. Neither is appellant a member of the Three Affiliated Tribes.[8]

---

[6] The Board knows of no other acts similar to the Act of Mar. 3, 1931. (Accordingly, other than 25 CFR 11.29C, there are no Departmental regulations regarding adoptions by the BIA, nor are there any BIA manual provisions on the subject.) In view of the strong congressional commitment to tribal control over child custody matters arising on the reservation as recently expressed in the Indian Child Welfare Act of 1978, 92 Stat. 3069, 25 U.S.C. §§ 1901–1963, the prospect of future enactments by Congress vesting additional adoption authority in the Bureau of Indian Affairs is most doubtful. It is indeed difficult to perceive a more paternalistic endeavor by the BIA on Indian reservations than the granting of adoptions of Indian children.

[7] Departmental approval of the Code of Laws for the Three Affiliated Tribes of the Fort Berthold Reservation was rendered on Feb. 4, 1944, by Oscar L. Chapman, Assistant Secretary.

In the absence of a legal adoption through the proper state or tribal forum, the question arises whether Theresa can be recognized as an adopted daughter of the decedent by Indian custom. The right to designate the customs that are to be given recognition in regulating matters that affect tribal internal and social relations rests with each tribe as an incident of its sovereignty. *United States* v. *Mazurie*, 419 U.S. 544 (1975). There is no universal doctrine of Indian custom adoption.[9]

There is no evidence that the Three Affiliated Tribes recognized adoption by Indian custom in 1945. Rather, it appears the only way an Indian adoption could be accomplished under tribal law would be in accordance with sec. 25 of the Code of Laws of The Three Affiliated Tribes which, with limited exceptions, required the consent of all parties [10] and acceptance thereof by the Fort Berthold Indian Court.[11]

Based on the above, the Board cannot sustain the Administrative Law Judge's holding that Theresa Bluhm is the adopted daughter of Victor Young Bear.[12]

II. The Paternity Question

Appellant challenges the Administrative Law Judge's determination that Stephanie Young Bear is the daughter of decedent on two grounds. First, it is alleged that the Administrative Law Judge failed to conduct a full and complete hearing on the paternity issue prior to ruling thereon. According to appellant, notwithstanding that some evidence regarding Stephanie's paternity was adduced at the evidentiary hearing of Aug. 30, 1978, it was the understanding of the parties that a supplemental hearing on this matter would be scheduled by the Administrative Law Judge. Second, appellant maintains that the paternity finding entered by the Administrative Law Judge is not supported by a preponderance of the evidence. We reject both of the above contentions.

[4] The Administrative Law Judge held two hearings in the subject estate. The first hearing held at Poplar, Montana, on Apr. 17, 1974,

---

[8] By order dated Apr. 13, 1944, Assistant Secretary Chapman, in response to a resolution of the Fort Berthold Tribal Business Council dated Mar. 9, 1944, entrusted to the Fort Berthold Tribal Business Council and the Fort Berthold Tribal Court "all jurisdiction and authority vested in the Court of Indian Offenses for the Fort Berthold Reservation, over Indians not members of the Three Affiliated Tribes who are members of any recognized tribe now under Federal jurisdiction."

[9] *Cf. Estate of Harold Humpy*, 7 IBIA 118, 86 I.D. 213 (1979), disavowing the theory of universal Indian custom divorce.

[10] *See* sec. 25, Code of Laws of the Three Affiliated Tribes, at (c) and (d). (Consent of a child over age 14 was not required.)

[11] *Id.* sec. 25(d).

[12] It is noted that in accordance with the laws of descent and distribution in Montana, Theresa shared in the estate of her deceased natural mother. She was also declared to be an heir at law of her natural father in the Departmental probate of his estate, as determined by North Dakota law then in effect, and would have shared in his estate had he died intestate. North Dakota has since adopted the Uniform Probate Code which generally precludes an adopted child from inheriting from his or her natural parents.

essentially resolved only that Victor Young Bear died without a will and that he was survived by a spouse, appellant herein. By notice dated Aug. 4, 1978, the Administrative Law Judge scheduled a supplemental hearing for Aug. 30, 1978, for the purpose of establishing "whether or not, in addition to the surviving spouse, Alice Bradford Young Bear, decedent had other heirs." The possibility that Stephanie Young Bear could be an heir at law of decedent was mentioned in the notice of hearing. Counsel for appellant appeared at the hearing of Aug. 30, 1978, prepared to rebut a showing that Stephanie Young Bear was fathered by decedent:

> As far as, now that it's been brought up, as far as Stephanie Young Bear is concerned, our only knowledge of Stephanie Young Bear until this order came out mentioning her name, was essentially the fact that Theresa Bluhm had had a child at a certain point in time. Now, from the time that order was issued, we've talked to our client and gathered up as much data as we can find, and based on her discussions with us, and my discussions with doctors and so forth, we doubt seriously whether Victor Young Bear could be the father of Stephanie Young Bear.

Tr. of hearing at 4.

A prima facie case was established at the hearing that Stephanie Young Bear, born Apr. 16, 1955, was fathered illegitimately by decedent by virtue of his unlawful intercourse with Theresa Bluhm on June 26, 1954. Appellant sought to rebut this showing primarily through two forms of hearsay evidence. First, appellant testified that decedent had told her that because of an accident he could not father children. Second, appellant offered into evidence an affidavit from a local physician in New Town stating that, in the physician's opinion, it is very unusual for a woman to carry a child for a period exceeding 285 days. (Here, carriage lasted 294 days.) The affidavit was rejected on grounds that the New Town physician should have been summoned to the New Town hearing to relate his expert opinion subject to cross-examination. Tr. of Aug. 30, 1978, hearing at 74.

Because Stephanie Young Bear was not represented at the New Town hearing through her own counsel, the Administrative Law Judge indicated at the hearing that he would hold yet another supplemental hearing in this case if, upon his review of the evidence, another hearing appeared necessary for the protection of her interests. Another hearing was not deemed required and the Administrative Law Judge entered a decision approximately 1 year later on Aug. 8, 1979, in which he evaluated the evidence as follows:

> I find that Stephanie Young Bear is the biological issue of decedent. I accept the credibility of Theresa Bluhm that she had intercourse only with decedent and that decedent was the only possible source of impregnation during the pertinent period. The testimony of Alice Young Bear is conflicting. She states that decedent fathered no children because she was "a very puny, sickly, skinny child" (Tr. 3) and challenges her own credibility when she later attributes the barren marriage to an accident in which decedent

> ent suffered injuries prior to the marriage. Having found decedent is the biological father of Stephanie Young Bear, there is no constitutional basis for a denial of the right of inheritance by Stephanie Young Bear (*Deta Mona Trimble and Jessie Trimble* v. *Joseph Roosevelt Gordon, et al*, 430 US 762, 52 L Ed 2d 31, 97 S Ct 1459).

Order Determining Heirs at 3.

In view of the foregoing, the Board is satisfied that appellant was allowed a full and complete hearing on the issue of Stephanie's paternity. Further, we agree with the Administrative Law Judge that the preponderance of the evidence establishes Stephanie Young Bear to be the daughter of decedent. *Cf. Estate of Alvin Hudson*, 5 IBIA 174 (1976).

Therefore, in accordance with the authority vested in the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Order Determining Heirs entered by Administrative Law Judge Garry V. Fisher on Aug. 8, 1979, is hereby reversed as to his finding that Theresa Bluhm is an heir at law of the decendent and affirmed as to his finding that Stephanie Young Bear is an heir at law of the decendent.

This decision is final for the Department.

Wm. Philip Horton
Chief Administrative Judge

I concur:

Franklin D. Arness
Administrative Judge

BADGER COAL CO.

2 IBSMA 147

Decided *July 25, 1980*

Petition for review by Badger Coal Company from a Nov. 20, 1979, order of dismissal entered in Docket No. CH 0–7–R by Administrative Law Judge Sheldon L. Shepherd. The dismissal operated to sustain Notice of Violation No. 79–I–3–15, alleging three violations of the effluent limitations.

Affirmed as modified.

1. Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally—Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Hearings Procedure—Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally

Where OSM fails to hold an informal assessment conference within 60 days of the request and the person assessed a civil penalty timely objects to the date of the conference but alleges no actual prejudice, no relief is appropriate.

2. Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally—Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Hearings Procedure—Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally

Where OSM fails to hold an informal assessment conference within 60 days of the request and the person assessed a civil penalty timely objects to the date of

the conference but then does not forward the proposed penalty with its petition for review, the petition must be dismissed.

APPEARANCES: David J. Romano, Esq., Young, Morgan & Cann, Clarksburg, West Virginia, for Badger Coal Company; John Woodrum, Esq., Office of the Field Solicitor, Charleston, West Virginia, Mark Squillace, Esq., and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

On Mar. 13, 1979, inspectors from the Office of Surface Mining Reclamation and Enforcement (OSM) inspected Badger Coal Company's (Badger's) tipple and preparation plant in Barbour County, West Virginia. The inspectors issued Notice of Violation No. 79–I–3–15 to Badger, alleging three violations of the effluent limitations in 30 CFR 715.17(a) and 717.17(a). These alleged violations were later terminated by OSM because the remedial actions had been completed.

On Apr. 10, 1979, Badger received a notice of proposed civil penalty assessment in the amount of $9,900. Badger filed a timely request for an assessment conference with OSM pursuant to 30 CFR 723.17.[1] The conference was held on July 19, 1979, 94 days after Badger's request was filed. Badger received the conference officer's determination, lowering the proposed civil penalty to $2,600, on Sept. 24, 1979.

On Oct. 9, 1979, Badger filed an "application for review" under "section 525(a)(1)" of the Act.[2] OSM filed a motion to dismiss on Oct. 26, 1979, and alleged that the filing was not timely. Badger responded to OSM's motion on Nov. 9, 1979, stating that its filing was proper under 30 CFR 723.18(b). The Administrative Law Judge issued a decision dismissing the case as untimely filed on Nov. 20, 1979. The same day OSM mailed an amended motion to dismiss, stating that if Badger's application was considered under 30 CFR 723.18 (b), it should still be dismissed because of Badger's failure to pay the full amount of the proposed penalty into escrow.

Badger filed a document entitled both "notice of appeal" and "petition for review" with the Board on Dec. 19, 1979. The Board issued a show-cause order on Dec. 26, 1979, directing the parties to address the questions of why the filing should not be treated as a petition for review and of whether the Board's decision in *C & K Coal Co.*, 1 IBSMA 118, 86 I.D. 221 (1979), applied. Badger responded to this order and on Feb. 22, 1980, the Board granted the petition limited to three questions: (1) was the question of OSM's failure to comply with 30

---

[1] It was not apparent from the file before the Administrative Law Judge that an assessment conference had been requested and held.

[2] Surface Mining Control and Reclamation Act of 1977, Act of Aug. 3, 1977, 91 Stat. 445, 30 U.S.C. § 1275(a)(1) (Supp I. 1977).

CFR 723.18(b), by not holding the assessment conference within 60 days, properly raised for the first time in Badger's response to the Board's show-cause order; (2) if that question was properly before the Board, what were the consequences of OSM's failure to comply with 30 CFR 723.18(b); and (3) for what reasons should the Board distinguish this case from *C & K Coal Co., supra*? Following further briefing, an oral argument was held on June 12, 1980.

Discussion and Conclusions

There is no question that Badger failed to forward the full amount of the proposed penalty to the Secretary to be held in escrow as required by sec. 518(c) of the Act.[3] However, Badger argues that since OSM failed to comply with the requirement of 30 CFR 723.18(b) that an informal assessment conference "shall be held" within 60 days after a request, such failure should result in the vacation of both a notice of violation or cessation order and the resulting civil penalty. The Board granted the petition to hear answers to the three questions listed above and to determine what, if any, relief should be given because of OSM's failure to comply with 30 CFR 723.18(b).

There is no indication in the published comments accompanying the initial regulatory program rulemaking proceeding why the 60-day requirement was included in sec. 723.18(b). The most probable reason for its inclusion was to prevent assessment conferences from being unduly delayed by establishing a guideline for their occurrence, since both the person assessed a civil penalty and OSM have an interest in the regularity and predictability of these conferences.[4] OSM should, therefore, hold assessment conferences within 60 days of the request, unless the person assessed a civil penalty requests or agrees to a delay.

[1] If OSM fails to hold a conference within 60 days, and if the person assessed a civil penalty timely objects to this failure and can prove actual prejudice, some relief may be appropriate. Timely objection would definitely include raising the issue to OSM before or at the expiration of the 60-day period or at the assessment conference itself. However, because a permittee might prefer to avoid the risk of prejudicing its case by raising the issue at the assessment conference, an objection made to the Administrative Law Judge at the first opportunity would also be timely. Actual prejudice might include, but not be limited to, proof of reduced bonding capacity or financial problems based upon an uncertain outstanding obligation.

---

[3] 30 U.S.C. § 1268(c) (Supp. I 1977). This requirement is implemented by 30 CFR 723.18(a) and 43 CFR 4.1152(b)(1).

[4] At oral argument, counsel for OSM stated:

"I think the purpose is more grounded in a time period to guide OSM in conducting its business. * * * I think there was an interest on the part of OSM that since they were creating a tolling of that 30 days to pay the money, that it was perhaps important to move that process along to prod OSM to assure that conferences were not unduly delayed" (Tr. at 34).

Because each case will undoubtedly involve different factual circumstances, an Administrative Law Judge should be free to exercise discretion in fashioning appropriate relief for failure to hold the conference within 60 days. However, the relief must address the prejudice shown. Therefore, appropriate relief would not include vacating a notice of violation or cessation order. It might be appropriate to reduce the civil penalty, but except in rare circumstances it seems unlikely that sufficient prejudice could be shown to justify vacating it.

[2] Nor could the Hearings Division or this Board permit the initiation of a review proceeding without the payment of the proposed penalty into escrow as required by sec. 518(c), not only because this relief is unrelated to the transgression, but also because 43 CFR 4.1152(b) and (c) mandate such payment.[5]

OSM's failure to hold Badger's assessment conference within 60 days of the request as required by 30 CFR 723.18(b) does not overcome Badger's failure to pay the proposed penalty into escrow as required by sec. 518(c) of the Act, 30 CFR 723.18(a), and 43 CFR 4.1152 (b) and (c). The Administrative Law Judge's Nov. 20, 1979, dismissal of this case is affirmed as modified by this option.

Will A. Irwin
Chief Administrative Judge

Newton Frishberg
Administrative Judge

ADMINISTRATIVE JUDGE MIRKIN DISSENTING:

In finding that under all circumstances the law requires a petitioner to prepay the proposed penalty in order to obtain a hearing before the Office of Hearings and Appeals (OHA), the majority position is contrary to the opinions of a variety of Federal judges, to pronouncements of OSM, and to the dictates of good judgment. In at least three instances district court judges have held the portion of 30 U.S.C. § 1268 (Supp. I 1977) that requires prepayment of the proposed penalty in order to seek administrative review to be unconstitutional.[1] As for OSM itself, except where it challenges the power of OHA to review a proposed penalty assessment without prior payment, it questions neither the power of the Department nor of itself to waive any such requirement.[2] And that takes us to the dictates of good judgment..

---

[5] As the delegate of the Secretary to perform review functions under the Act (43 CFR 4.1(b)(4)), this Board is bound by the duly promulgated regulations of this Department. *See United States* v. *Nixon*, 418 U.S. 683, 696 (1974); *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959); *Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954); *McKay* v. *Wahlenmaier*, 226 F. 2d 35 (D.C. Cir. 1955).

[1] This holding was reached in the decisions: *Indiana* v. *Andrus*, No. IP 78–501–C (S.D. Ind. June 10, 1980); *Star Coal Co.* v. *Andrus*, No. 79–171–2 (S.D. Iowa Feb. 13, 1980); *Virginia Surface Mining and Reclamation Ass'n* v. *Andrus*, 483 F. Supp. 425 (W.D. Va. 1980). Although all of these cases are in various stages of appeal, if this Board could put a more reasonable light on the prepayment requirement than the district judges now perceive, perhaps we might dampen their ardor to find unconstitutionality.

The subject matter of any case before us is not a conflict between private individuals over purely private rights, but a dispute over the operation of public policy.[3] Consequently, we, more so than judges, are called upon to do more than merely arbitrate whatever grievance has been presented to us. This does not mean that prudence does not dictate that we normally honor the same conventions and strictures that judges do. It does mean that when an exceptional situation arises that we are not slavishly bound to them.[4] And we should certainly not bind ourselves to a rule of practice that forbids review of a penalty assessment where departmental failures of performance occur between the time the assessment is made and the time the review is sought.[5] The condign remedy when OSM tarries beyond the 60 days without the agreement of the permittee and when that permittee makes timely complaint to OHA is not, as Badger would have us believe, to void the notice of violation. Nor is it to do what the majority does, lecture OSM and urge it to sin no more. The fitting resolution, under the circumstances, is to hold, in effect, that OSM is estopped from invoking the penalty prepayment requirement and, provided all else is regular, proceed with the review by OHA. If the permittee can show actual prejudice by the delay, then additional remedies should also be considered.

In order for this program to be administered properly, it is important that the various branches of the Department perform their particular missions. That of OSM is to pursue violations whenever and wherever it believes them to be. Ours is to review OSM's activities in light of the relevant regulations.[6] It is not merely to say "Amen" to whatever OSM deems appropriate, for unless we review OSM's activities with a broader view than that of OSM of what policy requires, we will not well serve OSM or the public in whose interests we purportedly operate. By our own failure, OSM will have to exercise more caution in deciding which matters to prosecute for it will have to be conscious that its excesses are not likely to be corrected by us.

---

[2] By enactment of 30 CFR 723.18(b), granting 60 days to hold a review conference, the Department has provided for far more than 30 days in which to honor the "mandates" of 30 U.S.C. § 1268(c) (Supp. I 1977), 30 CFR 723.18(a), and 43 CFR 4.1152(c).

By memorandum of June 24, 1980, from the Office of the Solicitor to the Director of the Office of Surface Mining, that Director has been instructed in cases concerning blasting, effluent limitations, and grandfather exemptions for mining on prime farmlands that notices of violations in these instances shall state in reference to the 30-day appeal provision:

"OSM has determined that this 30-day period should be stayed pending the final outcome of the Court of Appeals decision. You will be notified in writing when that occurs. If the regulation is ultimately upheld you will be given an additional 30 days to seek an appeal in accordance with Section 518(c)."

[3] *See* Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281 (1976).

[4] *See* P. Nonet and P. Selznick, *Law and Society in Transition: Toward Responsive Law*, Ch. 2, 3, Harper Colophon Books (1978).

[5] 30 CFR 723.16–18 constitutes a regulatory continuum culminating in a petition for review. Sec. 723.16 requires OSM to serve a proposed assessment within 30 days of the issuance of notice of violation. Sec. 723.17 entitles a permittee to request a conference to review the proposed assessment. Sec. 723.18 states that a permittee may, within 30 days from receipt of a proposed assessment, obtain a hearing before OHA by filing a petition and tendering full payment of the proposed assessment, *except*, a timely filing for a conference request pursuant to sec. 723.17 suspends the running of the 30-day period for requesting a hearing before OHA.

But instead of administering our portion of the Act in accordance with what we perceive to be the proper policy as illuminated by the variety of different interest groups that are concerned with it, we look excessively to OSM and even then to its preachments rather than its practices.[7] We are like rheumy-eyed heroes of Verdun, defending the fortress against the savage foe, reciting to ourselves over and over "they shall not pass." Unfortunately, we fail to realize this foe has not only infiltrated through unguarded openings, but that some of those we propose to protect are even fraternizing with it.

I would grant the petition for review and remand for a hearing.

Melvin J. Mirkin
Administrative Judge

---

[6] The majority reminds us that the "Board is bound by the duly promulgated regulation of this Department" (n. 5, p. 322). There is no disagreement with the precept, only with an application whereby the majority, instead of reconciling 30 CFR 723.18(a) and 43 CFR 4.1152(c) with 30 CFR 723.18(b), is acting as if the latter did not exist.

[7] As is illustrated by n. 2, *supra*.

KAISER STEEL CORP.

2 IBSMA 158

Decided *July 25, 1980*

Appeal by Kaiser Steel Corporation from a Jan. 22, 1980, decision by Administrative Law Judge Tom M. Allen in Docket No. DV 9-6-R vacating in part and affirming in part Notices of Violation Nos. 79-V-1-5 and 79-V-1-8.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures: Generally—Surface Mining Control and Reclamation Act of 1977: Initial Regulatory Program: Generally

The Secretary of the Interior, through the promulgation of regulations, has determined that sec. 521(a)(1) of the Act does not apply during the initial regulatory program.

2. Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures: Generally—Surface Mining Control and Reclamation Act of 1977: Initial Regulatory Program: Generally—Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally

OSM is required to issue a notice for violations of the initial regulatory program even if a state has already taken enforcement action against the same violation.

3. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Generally

The Board will not rule on the merits of a notice of violation that is not properly before it.

4. Surface Mining Control and Reclamation Act of 1977: Water Quality Standards and Effluent Limitations: Sedimentation Ponds

The sedimentation pond requirement of 30 CFR 715.17(a) and 717.17(a) is a preventive measure and proof of the harm it is intended to prevent is not necessary to establish a violation of that requirement.

APPEARANCES: John P. Davidson, Esq., Kastler, Erwin & Davidson, Raton, New Mexico, for Kaiser Steel Corp., William H. Penney, Esq., Office of the Regional Solicitor, Denver, Colorado, and Mark Squillace, Esq., Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

Kaiser Steel Corp. (Kaiser) has appealed the decision of Administrative Law Judge (Judge) Tom M. Allen holding that Kaiser had violated the Surface Mining Control and Reclamation Act of 1977 (Act).[1] For the reasons discussed below, we affirm the Judge's decision.

Background

On Feb. 22, 1979, Kaiser's York Canyon deep and surface mines located outside Raton, Colfax County, New Mexico, were inspected by the Office of Surface Mining Reclamation and Enforcement (OSM) and the State of New Mexico. Kaiser received notices of violation from both OSM and the State because of alleged violations discovered during that inspection. Notice of Violation No. 79–V–1–5, issued by OSM, contained seven violations; Notice of Violation No. 79–V–1–8 listed three violations. OSM subsequently issued proposed civil penalty assessments based on these notices.

Kaiser and OSM conducted extensive settlement negotiations throughout the remainder of 1979. As a result of these negotiations, the parties merged several of the individual violations listed in the two notices and agreed upon the amount of the civil penalty. When the case reached the Judge, it was presented on the basis of stipulations. Kaiser challenged all of the alleged violations on the grounds that OSM had failed to provide the State with 10 days' notice of the finding of potential violations as required by sec. 521(a)(1) of the Act (30 U.S.C. § 1271(a)(1) (Supp. I 1977)) and that citations for the same violations by both the State and OSM constituted double jeopardy. In addition, Kaiser argued that OSM had not proved a prima facie case as to two alleged violations: (1) failure to maintain a portion of the main access road "to prevent additional contribution of suspended solids to stream flow," in violation of 30 CFR 715.17 and 717.17, and (2) failure to pass all surface drainage through a sedimentation pond or series of sedimentation ponds, also in violation of 30 CFR 715.17 and 717.17. The civil penalty amount was set at $8,000, subject to dismissal if Kaiser's arguments were accepted.

---

[1] Act of Aug. 3, 1977, 91 Stat. 445, 30 U.S.C. §§ 1201 through 1328 (Supp. I 1977).

The decision below was issued on Jan. 22, 1980. All of Kaiser's arguments were rejected. The Judge, however, found that OSM lacked jurisdiction over the portion of the access road in question. Kaiser sought review of that decision on Feb. 19, 1980. Both parties have submitted briefs.

Discussion and Conclusions

[1] Kaiser's first argument is that OSM cannot issue a notice of violation under sec. 521(a)(3) of the Act (30 U.S.C. § 1271(a)(3) (Supp. I 1977)) unless it has first given the State regulatory authority 10 days in which to take action against the alleged violation in accordance with the provisions of sec. 521(a)(1) (30 U.S.C. § 1271(a)(3) (Supp. I 1977)). This argument was rejected by the Board in *Dayton Mining Co., Inc., & Plateau, Inc.*, 1 IBSMA 125, 86 I.D. 241 (1979).[2] In that case the Board held that the Secretary had determined that the 10-day notice requirement did not apply during the initial regulatory program. Kaiser presented no arguments that would warrant a reappraisal of the basis for that decision.

[2] Kaiser next argues that enforcement by both OSM and the State is unconstitutional double jeopardy. To the extent that this argument raises constitutional issues, the Board is not empowered to decide it.[3] However, to the extent that the question is within the Board's power to decide, this argument was rejected in *Eastover Mining Co.*, 2 IBSMA 5, 87 I.D. 9 (1980), and *Wilson Farms Coal Co.*, 2 IBSMA 118, n.6 at 224, 87 I.D. 243 (1980). OSM is required by 30 CFR 722.12(a) to issue a notice of violation during the initial regulatory program when a violation is discovered. This power is in addition to state enforcement powers.

[3] Kaiser alleges that OSM failed to establish a prima facie case as to violation No. 1, part A, of Notice of Violation No. 79-V-1-5. That notice alleged a violation of 30 CFR 715.17 and 717.17 with regard to the maintenance of the main access road to the mine. The Judge held that the notice of violation as to this road "should be vacated" because "the section of road in question was not subject to OSM jurisdiction" (Decision at 5). OSM did not appeal the Judge's decision. Instead, both parties ignored his ruling and argued the merits of this issue as if the notice of violation had been upheld. The Board de-

---

[2] The same conclusion was reached in *Union Carbide Corp.* v. *Andrus*, 9 ELR 20701 (S.D.W.Va. 1979).

[3] In passing, we note that reliance on criminal double jeopardy limitations is inappropriate under a civil statute. *Helvering* v. *Mitchell*, 303 U.S. 391, 398 (1938). *See Breed* v. *Jones*, 421 U.S. 519, 528 (1975).

clines to rule on the merits of a notice of violation that is not properly before it. 43 CFR 4.1273(c). Thus, the holding below with respect to OSM's lack of jurisdiction over the road will not be disturbed.

[4] Finally, Kaiser argues that OSM did not prove a prima facie case as to violation No. 6 of Notice of Violation No. 79–V–1–5 as merged in the stipulations. Kaiser asserts that it should not have been cited for failure to have sedimentation ponds under 30 CFR 715.17 and 717.17 because there was no proof that discharges from the permit area exceeded the effluent limitation of 30 CFR 715.17(a) and 717.17(a). In *Black Fox Mining & Development Corp.*, 2 IBSMA 110, 114, 87 I.D. 207, 209 (1980), the Board rejected this argument, holding that "the sedimentation pond requirement of 30 CFR 715.17(a) is a preventive measure and proof of the occurrence of the harm it is intended to prevent is not necessary to establish a violation of that requirement."

For these reasons, the Administrative Law Judge's decision of Jan. 22, 1980, is affirmed.

Newton Frishberg
Administrative Judge

Melvin J. Mirkin
Administrative Judge

Will A. Irwin
Chief Administrative Judge

VIRGINIA IRON, COAL AND COKE CO.

2 IBSMA 165

Decided *July 28, 1980*

Appeal by the Office of Surface Mining Reclamation and Enforcement (OSM), from a Feb. 15, 1980, decision of Administrative Law Judge David Torbett in Docket Nos. CH 9–18–R, CH 9–24–R, CH 9–25–R, and CH 9–26–R in which he vacated Notices of Violation Nos. 78–I–17–18, 78–I–17–19, and 79–I–17–2 after finding that OSM lacked authority to regulate the tipple and preparation plant involved in those notices.

Affirmed in part, reversed in part and remanded.

1. Surface Mining Control and Reclamation Act of 1977: Tipples and Processing Plants: At or Near a Minesite—Surface Mining Control and Reclamation Act of 1977: Tipples and Processing Plants: In Connection With

A preparation plant which is located 1 mile from a deep mine that processes its coal through the plant and which is permitted to the same person as is the mine is both at or near the mine and operated in connection with the mine.

2. Surface Mining Control and Reclamation Act of 1977: Tipples and Processing Plants: In Connection With

Although a contract, lease, or sell-back arrangement may be sufficient to establish a connection between a coal mine and a processing facility, the nature of that arrangement must be proved.

APPEARANCES: Billy Jack Gregg, Esq., Office of the Field Solicitor, Charleston, West Virginia, Donald C. Baur, Esq., Mark Squillace, Esq., and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement; James P. Jones, Esq., Penn, Stuart, Eskridge & Jones, Bristol, Virginia, for Virginia Iron, Coal & Coke Company.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

This appeal raises the issue of the extent of the Office of Surface Mining Reclamation and Enforcement's (OSM's) authority to regulate tipples and preparation plants under the Surface Mining Control and Reclamation Act of 1977.[1] The Administrative Law Judge found in this case that Virginia Iron, Coal and Coke Company's (Virginia Iron's) tipple and preparation plant were not subject to OSM's regulation. Because we hold that the preparation plant was subject to OSM's authority, that portion of the decision below is reversed and remanded. The portion of the decision relating to the tipple is affirmed.

Background

On Dec. 12–13, 1978, OSM, accompanied by inspectors from the Virginia Division of Mined Land Reclamation and representatives of Virginia Iron, inspected the Tom's Creek Tipple and Dale Ridge Preparation Plant in Wise County, Virginia.[2] Virginia Iron held Virginia surface mining permits No. 2572 on the tipple (Tr. 93, 209) and No. 2573 on the preparation plant (Tr. 10; Resp. Exh. 14). OSM issued three notices of violation to Virginia Iron after these inspections: No. 78–I–17–18, alleging a violation of 30 CFR 717.17(a) for failure to pass all surface drainage from the disturbed area through a sedimentation pond at the tipple; No. 78–I–1–19, alleging the same violation at the preparation plant; and No. 79–I–17–2, alleging violations of the effluent limitations of 30 CFR 717.17(a) at the preparation plant.

The Dale Ridge Preparation Plant was operated under Virginia surface mining permit No. 2573 issued to Virginia Iron on July 19, 1978 (Tr. 10; Exh. 14). The facility is a railhead (Tr. 11) and has coal stockpiles, a preparation plant, railroad siding, haul roads and two waste disposal areas (Tr. 14). Coal is washed and loaded at the plant (Tr. 14). At the time of the inspection the facility covered 58.9 acres (Tr. 16, 55).

---

[1] Act of Aug. 3, 1977, 91 Stat. 445, 30 U.S.C. §§ 1201–1328 (Supp. I 1977).

[2] The hearing before the Administrative Law Judge and his decision also relate to notices of violation issued following a Jan. 18, 1979, inspection of Virginia Iron's Littlejohn and Pound River deep mines in Wise County, Virginia, permit No. 2521, and a Jan. 10, 1979, inspection of the Nora Preparation Plant in Dickenson County, Virginia. The Administrative Law Judge sustained these notices. Virginia Iron's cross-appeal of this decision was denied by order of the Board dated Apr. 4, 1980, for not being timely filed.

According to Virginia Iron Vice President for Operations, Eugene Brashear, Virginia Iron does not itself operate any mines (Tr. 89). Virginia Iron does, however, own coal throughout the area and leases its mineral rights to contractors who mine the coal and sell it back to Virginia Iron (Tr. 14). The contractor usually takes out a mining permit in its name. Virginia Iron does, however, hold permit No. 2521-U,[3] on the Littlejohn and Pound River deep mine.[4] Coal from this mine is mined by a contractor and processed at the preparation plant (Tr. 90, 92) which is approximately 1 mile away (Tr. 85). The permit was taken out in Virginia Iron's name in order to speed the permitting process (Tr. 94–95) because Virginia Iron "needed deep mined coal for [the] Dale Ridge Plant" (Tr. 94).

Coal processed at the Dale Ridge facility is delivered by truck over public roads (Tr. 74) from mines 1.3 to 8.6 miles away (Tr. 236–237). Dale Ridge is connected by a private road to one mine (Tr. 72–73). This road is not maintained by the state, although there are houses on it and there are no posted restrictions on its use (Tr. 83–85).

The Tom's Creek Tipple covers 10 acres (Tr. 212) and prepares coal by crushing, removing slate and loading it into rail cars. The tipple does not have a washer (Tr. 210). It was operated under Virginia permit No. 2572 issued to Virginia Iron (Tr. 209).

The tipple is immediately adjacent to the Littlejohn and Pound River deep mine, permitted to Virginia Iron, but receives no coal from that mine. Coal from that mine goes to the Dale Ridge facility (Tr. 211, 234) because it needs additional cleaning (Tr. 238–239). Coal is trucked to the tipple over public roads from various mines in the area, including mines operated under contract with Virginia Iron (Tr. 210, 235). These mines are located from 1.5 to 25 miles from the tipple (Tr. 235–236).

In his Feb. 15, 1980, decision, the Administrative Law Judge found that neither the Dale Ridge Preparation Plant nor the Tom's Creek Tipple were "surface coal mining operations" under 30 CFR 700.5 and, therefore, vacated the three notices of violation because OSM lacked jurisdiction over the facilities. OSM timely appealed this decision,[5] and both parties filed briefs.

---

[3] During the pendency of the case, permit No. 2521 was apparently renewed and given permit No. 2521-U.

[4] The Administrative Law Judge sustained a notice of violation issued to Virginia Iron for this mine. In its brief to the Board, Virginia Iron disputed for the first time that it held a deep mine "permit" (Br. at 9–10). Although not clear from the brief, this contention was apparently addressed to the status of the operation at the Littlejohn and Pound River deep mine. The testimony of Virginia Iron's own witnesses at the hearing was that Virginia Iron held a permit on that mine.

Discussion and Conclusions

In order for OSM to regulate a tipple or preparation plant, it must be operated "in connection with" a mine and be located "at or near the minesite." As we have indicated in the past, there may be many ways in which a processing facility is operated "in connection with" a mine. *Drummond Coal Co.*, 2 IBSMA 96, 101, 87 I.D. 196, 198 (1980). Common ownership of the mine or mines and the processing facility and use of that facility by those mines is one such relationship. *Id.* at 101.

In this case, Virginia Iron owns, operates, and holds the permit on the tipple and preparation plant. It also owns much of the coal processed through the facilities, but the actual mining is done by apparently independent operators under some kind of lease or contract agreement.

[1] In regard first to the Dale Ridge Preparation Plant, the evidence presented is sufficient to hold that this facility is operated in connection with the Littlejohn and Pound River deep mine, also permitted to Virginia Iron, and that it is located near that minesite. The testimony of Virginia Iron's vice-president indicates that the deep mine was opened in order to provide deep mined coal for the Dale Ridge plant and that coal from that mine is processed through the facility. The mine is only 1 mile from the plant. These facts are sufficient to establish OSM's authority to regulate. The Administrative Law Judge's decision that OSM lacked this authority over this facility is therefore reversed.

The evidence in the record as to the Tom's Creek Tipple, however, is insufficient for a determination that the tipple is subject to OSM's regulation. The tipple is located immediately adjacent to the Littlejohn and Pound River mine, but no coal from that mine is processed through the facility. Therefore, the evidence does not disclose that the tipple is operated in connection with that mine. Some of the coal processed through the tipple was owned by Virginia Iron, but mined by independent operators who held the mining permits in their own names and who sold at least some of the coal back to Virginia Iron.

[2] A contract, lease, or sell-back arrangement such as that mentioned but not explained in this case may be sufficient to establish a connection between a coal mine and a processing facility. The nature of that arrangement, however, must be proved.[6] In the absence of such

---

[5] *See* n.2, *supra.*

[6] For example, the terms concerning the duration, exclusivity, or other relevant matters of any agreement should be demonstrated.

f the Board holds that OSM
d to show that the Tom's Creek
ple was operated "in connection
" a coal mining operation
er than being merely a conveni-
y located tipple that was used by
ral coal mines in the area. We
efore affirm the Administrative
Judge's finding that OSM
ed authority to regulate the
's Creek Tipple.

ecause of his disposition of this
the Administrative Law
ge did not decide whether the
ces of violation issued for the
e Ridge Preparation Plant were
per. The testimony on this issue
controverted. Although OSM
es the Board to hold the notices
valid, we prefer that these
tions of fact be determined by
Administrative Law Judge who
ducted the hearing.

herefore, this case is remanded
he Administrative Law Judge
a determination of the validity
Notices of Violation Nos. 78-I-
9 and 79-I-17-2. The decision
Notice of Violation No. 78-I-
8 should be vacated is affirmed.

Will A. Irwin,
Chief Administrative Judge

Newton Frishberg,
Administrative Judge

Melvin J. Mirkin,
Administrative Judge

TOPTIKI COAL CORP.

2 IBSMA 173

Decided *July 28, 1980*

Appeal by the Office of Surface Mining Reclamation and Enforcement from the Nov. 21 1979, decision of Administrative Law Judge Tom M. Allen (Docket Nos. NX 9-69-R and NX 9-43-P) vacating Notice of Violation No. 79-II-18-24 issued to Toptiki Coal Corp. for allegedly placing spoil on the downslope in violation of 30 CFR 716.2(a).

Reversed and remanded.

1. Surface Mining Control and Reclamation Act of 1977: Spoil and Mine Wastes: Downslope—Surface Mining Control and Reclamation Act of 1977: Words and Phrases

"Downslope." The downslope in a multiple highwall mining operation is the land surface between a valley floor and the projected outcrop of the lowest coalbed currently being mined along each highwall, not the area between a valley floor and the projected outcrop of the lowest coalbed under permit.

APPEARANCES: Randolph L. Jones, Jr., Esq., MAPCO Inc., Tulsa, Oklahoma, for Toptiki Coal Corp.; John P. Williams, Esq., Office of the Field Solicitor, Knoxville, Tennessee, and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Division of Surface Mining, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

Factual and Procedural Background

On May 21, 1979, an inspector for the Office of Surface Mining Reclamation and Enforcement (OSM), issued Notice of Violation No. 79–II–18–24 to Toptiki Coal Corp. (Toptiki) under the authority of the Surface Mining Control and Reclamation Act of 1977 (Act).[1] The notice charged Toptiki with a violation of 30 CFR 716.2(a) because "spoil material has been placed and allowed to remain on the downslope."[2]

Toptiki holds a permit to conduct a four-seam steep slope operation in Martin County, Kentucky. Toptiki began to mine the lowest seam on the mountain before the effective date of the Act. It therefore was not required at that time to eliminate the highwall and bench resulting from that activity instead, the operator took the spoil it extracted from the area of that seam and pushed it into a hollow fill below the seam. When, after the passage of the Act, the elimination of highwalls was required, Toptiki had insufficient spoil from the lowest seam area to eliminate its highwall. Toptiki decided to push excess spoil from operations on the higher seams to the lowest bench for that purpose. However, it did not mine the next-to-lowest seam next, but the highest and next-to-highest seams. Therefore, Toptiki pushed excess spoil from mining the two highest seams across the area where the next-to-lowest seam lay to eliminate the highwall at the lowest seam. This area was 100 to 150 feet in width (from the bench of the next-to-highest seam to the top of the highwall of the lowest seam) and approximately 600 feet long. A significant amount of organic material was allowed to remain on this area when Toptiki began to push spoil onto it. This is the condition which the inspector observed on May 21, 1979, and which prompted him to issue the notice in question.

Toptiki applied for review of the notice with the Office of Hearings and Appeals (OHA). The case was heard on Oct. 16, 1979.[3]

Toptiki argued throughout the proceeding below that the notice was invalidly issued because the area in question is not a "downslope" within the meaning of the definition in 30 CFR 710.5. The Administrative Law Judge agreed, ruling that the downslope is the area between the valley floor and the lowest coal seam *permitted* to be mined. Therefore, the area in question, being *above* the lowest permitted seam, could not be downslope. Accordingly, the notice of violation was vacated in a decision dated Nov. 21, 1979.[4] OSM filed a timely appeal from that decision.

---

[1] Act of Aug. 3, 1977, 91 Stat. 445, 30 U.S.C. §§ 1201–1328 (Supp. I 1977).

[2] The notice charged two other violations of the regulations, but they are not in issue here.

[3] Toptiki also petitioned for review of a notice of civil penalty assessment. That was consolidated with the application for review, but because of the nature of the decision on the merits the penalty issues were never reached.

Discussion

[1] We do not agree with the conclusion below. The sec. 710.5 definition of downslope [5] uses the present progressive tense ("being mined"), to modify "coalbed"; that is, a downslope is an area below the lowest coalbed *currently* being mined. Since Toptiki was not currently mining the two lowest seams, everything below the next-to-highest seam is downslope. The fact that the bench and highwall of the lowest seam interrupted the downslope is of no consequence; they are simply special parts of the downslope. *See Island Creek Coal Co.*, 2 IBSMA 125, 87 I.D. 304 (1980).

Both parties have requested that the Board decide the penalty issues if it reverses the decision below. It is the Board's preference, however, unless it is otherwise impracticable, that the Hearings Division conduct the fact-finding involved in an initial decision on the penalty issues. The existing record in this case may be sufficient for this purpose; if it is not, of course an Administrative Law Judge may order whatever is needed to make it so.

Therefore, it is ordered that the Nov. 21, 1979, decision in this case is reversed, and the case is remanded to the Hearings Division for further proceedings not inconsistent with this opinion.

Melvin J. Mirkin
Administrative Judge

Will A. Irwin
Chief Administrative Judge

Newton Frishberg
Administrative Judge

G. R. WRIGHT, INC.

2 IBSMA 180

Decided *July 29, 1980*

Appeal by G. R. Wright, Inc., from a Mar. 6, 1980, decision by Administrative Law Judge Sheldon L. Shepherd holding that Violation No. 4 of Notice of Violation No. 79-I-54-3 and Cessation Order No. 79-I-54-2 were properly

---

[4] The decision was based on *Black Creek Coal Co.*, Docket No. CH 8-3-P (Dec. 1, 1978), an earlier decision of the same Administrative Law Judge which was not appealed and by which he considered himself to be bound. It should be observed that no Administrative Law Judge is bound by any decision in a case before the Hearings Division. If such a decision is not timely appealed, it becomes the law of and is final for only that case.

[5] The definition found in 30 CFR 710.5 reads as follows: "*Downslope* means the land surface between a valley floor and the projected outcrop of the lowest coalbed being mined along each highwall." (Italics in original.)

issued (Docket Nos. CH 9-107-R and CH 9-200-R).

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Variances and Exceptions: Generally

The regulatory authority must specifically authorize the disturbing of an area by surface coal mining operations within 100 feet of an intermittent or perennial stream, and that requirement necessitates a variance procedure involving specific review and evaluation of proposals.

APPEARANCES: Leo M. Stepanian, Esq., Brydon, Stepanian & Muscatello, Butler, Pennsylvania, for G. R. Wright, Inc.; David L. Hiller, Esq. and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Division of Surface Mining, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement; Robert P. Ging, Jr., Assistant Attorney General, Commonwealth of Pennsylvania, Pittsburgh, Pennsylvania, for amicus curiae, the Department of Environmental Resources, Commonwealth of Pennsylvania.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

G. R. Wright, Inc. (Wright) has appealed from a Mar. 6, 1980, decision of the Hearings Division upholding Violation No. 4 of Notice of Violation No. 79-I-54-3 for allegedly conducting surface coal mining operations within 100 feet of an intermittent or perennial stream in violation of 30 CFR 715.17(d)(3) and upholding Cessation Order No. 79-I-54-2 issued for a failure to abate that violation. We affirm the decision.

Procedural and Factual Background

On May 28, 1979, pursuant to the Surface Mining Control and Reclamation Act of 1977 (Act)[1] two reclamation specialists with the Office of Surface Mining Reclamation and Enforcement (OSM) inspected Wright's mine, Permit No. 117-7, in Butler County, Pennsylvania. As a result of the inspection OSM issued Notice of Violation No. 79-I-54-3 containing six alleged violations. On June 4, 1979, Wright sought review of that notice. Subsequently, OSM issued two cessation orders for failure to abate Violation Nos. 3 and 4 of the notice, respectively. Wright applied for review of the orders and on Nov. 9, 1979, a hearing was held. The only issue at the hearing was the validity of Violation No. 4 of the notice and the accompanying cessation order.[2] In his Mar. 6, 1980, decision the Administrative Law Judge found that both were properly issued. Wright filed a timely appeal. On May 27,

---

[1] Act of Aug. 3, 1977, 91 Stat. 445, 30 U.S.C. §§ 1201-1328 (Supp. I 1977).

[2] At the hearing OSM agreed to vacate Violation No. 3 of the notice and accompanying Cessation Order No. 79-I-54-1. Wright withdrew with prejudice the application for review as it related to Violation Nos. 1, 2, 5, and 6 of the Notice.

1980, the Board received a petition to intervene and a brief prepared by the Department of Environmental Resources (DER) for the Commonwealth of Pennsylvania. On May 29, 1980, the Board granted leave to file the brief and accepted it.

With respect to Violation No. 4 there is no dispute that in its mining operations on Permit No. 117-7 Wright placed and stored spoil within the 100-foot buffer zone of an intermittent stream (Exh. R-2 through R-6; Tr. 11-13, 15). The entire 100-foot buffer zone had been disturbed along the stream for a distance of 700 feet. (Tr. 15, 35). There was evidence that sediment from the buffer zone had entered the stream (Tr. 17) and that spoil from the spoil banks had actually rolled off into the stream (Tr. 12).

The remedial action required by the OSM inspectors was to regrade, reclaim, seed, and mulch the disturbed area near the stream or obtain a variance from the regulatory authority allowing disturbance within the buffer zone (Exh. R-1; Tr. 16). The original time for abatement, June 28, 1979, was subsequently extended to Aug. 22, 1979. On Aug. 23, 1979, an OSM inspector visited the site and issued Cessation Order No. 79-I-54-2 for failure to abate Violation No. 4. The northern 400 feet of the area had been regraded. The southern 300 feet had been pulled back by a dragline, but it had not been regraded (Tr. 36). No other remedial work had been undertaken (Tr. 36).

Discussion

On appeal Wright argues that it did not violate 30 CFR 715.17(d)(3) in the placement of spoil because it had obtained oral approval for its operations from a state mine inspector.[3] Wright merely asserts that it received an oral variance. It provided no independent evidence to support this assertion other than the statements of its owner, G. R. Wright (Tr. 84-86, 90).

Pennsylvania law provides that a permittee shall not mine within 100 feet of the bank of any stream.[4] The Pennsylvania DER indicates that it has consistently interpreted Pennsylvania law as prohibiting the placement of spoil within 100 feet of a stream. DER also points out that Pennsylvania mine inspectors do not have the power, or authority, under Pennsylvania law to grant a waiver to an operator from validly enacted laws. DER states that it is not the law nor has it ever been the policy of DER that an inspector could grant a stream variance. In fact, Pennsylvania law indicates the necessity for a public hearing prior to the granting of such a variance.[5]

---

[3] 30 CFR 715.17(d)(3) provides. "No land within 100 feet of an intermittent or perennial stream shall be disturbed by surface coal mining and reclamation operations unless the regulatory authority specifically authorizes surface coal mining and reclamation operations through such a stream." The placement of spoil is an activity covered by the definition of surface coal mining and reclamation operations in 30 CFR 700.5.

[4] Sec. 77.92 of the rules and regulations of the Environmental Quality Board, 25 Pa. Code 77.92(a)(5), provides that:

"The permittee shall not mine within one hundred (100) feet of the outside line of the right-of-way of any public highway or within one hundred (100) feet of any cemetery or the bank of any stream. * * * If the permittee should be granted an exception after public hearing to mine within any of the above restricted areas, reclamation of all areas shall be to the approximate original contour."

[1] Even assuming that the State inspector did orally condone some type of operations by Wright within the 100-foot stream buffer, he was without authority to do so. The specific authorization of the regulatory authority referred to in 30 CFR 715.17(d)(3) requires a procedure involving specific review and evaluation of proposals rather than oral on-site ad hoc variances.[6] *See Carbon Fuel Co.*, 1 IBSMA 253, 86 I.D. 483 (1979); *Alabama By-Products Corp.*, 1 IBSMA 239, 86 I.D. 446 (1979). There was no such specific authorization in this case.

Appellant also argues that it cannot be charged with a violation because the Secretary failed to set forth an inconsistent State law as required by 30 U.S.C. § 1255(b) (Supp. I 1977). The Pennsylvania law which appellant asserts is inconsistent states that "no operator shall open any pit for surface mining operations * * * within one hundred feet of * * * the bank of any stream."[7] Apparently appellant's claim of inconsistency relates to the fact that the Pennsylvania law refers only to opening a pit rather than placing spoil.

Such a narrow reading does not comport with good sense or the intent of Pennsylvania law as stated by DER on p. 3 of its brief: "[T]he Department has consistently interpreted the mandate of the [Pennsylvania] Mining Act and the rules and regulations of the Environmental Quality Board as prohibiting the placement of spoil or otherwise affecting [an area] within one hundred (100) feet of a stream. There is no conflict between the Pennsylvania mining law and regulations, and the Act and regulations. In fact, Pennsylvania law actually describes the process that is necessary to obtain the specific authorization of the regulatory authority referred to in 30 CFR 715.17(d)(3).[8]

The decision appealed from is affirmed.

MELVIN J. MIRKIN
Administrative Judge

NEWTON FRISHBERG
Administrative Judge

WILL A. IRWIN
Chief Administrative Judge

---

[5] 25 Pa. Code 77.92(a)(5).

[6] The necessity of a review procedure was emphasized in the preamble to the interim regulations which addressed comments concerning 30 CFR 715.17(d)(3):

"The paragraph has been amended slightly to take into account the approval authority of the regulatory authority to specifically review and evaluate proposals to conduct any operations within 100 feet of a perennial or intermittent stream. Thus, if operations can be conducted within 100 feet of a stream in an environmentally acceptable manner, they may be approved." 42 FR 62652 (Dec. 17, 1977).

[7] Appellant cites the law on p. 6 of its brief as: "*The Bituminous Coal Open Pit Mining Conservation Act*, Act of Jan. 19, 1968, P.L. 1012, 52 P.S. 1396.4b(c), as amended."

[8] *See* 52 Pa. Cons. Stat. § 1396.4b(c); 25 Pa. Code 77.92(a)(5).

APPEAL OF N. J. RIEBE ENTERPRISES, INC.

IBCA-1266-5-79

Decided *July 30, 1980*

Contract No. 14-16-0002-78-128, Fish and Wildlife Service.

Appeal denied.

1. Contracts: Construction and Operation: Action of Parties—Contracts: Construction and Operation: Duty to Inquire

Where the scope of the work in the contract specifications included providing complete electrical service to the project and clearly indicated that in doing so the contractor must meet the requirements of the serving electric utility, the contractor assumed the risk of the cost of complying with those requirements when it failed to ascertain or inquire, before submitting its bid what those costs might be.

APPEARANCES: Mr. Carl C. Kircher, N. J. Riebe Enterprises, Inc., Yuma Arizona, for Appellant; Mr. Thomas J. O'Hare, Department Counsel, Albuquerque, New Mexico, for the Government.

OPINION BY ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF CONTRACT APPEALS

Background

On Sept. 25, 1978, N. J. Riebe Enterprises, Inc., an Arizona corporation with its principal place of business at Yuma, Arizona (appellant), entered into a construction contract with the U.S. Fish and Wildlife Service (FWS) of the Department of the Interior for the purpose of constructing a headquarters complex at the Imperial National Wildlife Refuge, 40 miles north of Yuma on the Colorado River. The contract price was $734,367. The complex to be built included an office/visitor center in duplex, three residences, and related utilities and sitework at Imperial National Wildlife Refuge.

The project was apparently satisfactorily completed. At least there is no evidence in the appeal file that it was not. The only dispute giving rise to this appeal is the claim of the appellant for reimbursement of the sum of $5,609 which it was required to pay as a nonrefundable deposit to the serving electric utility (Wellton-Mohawk Irrigation and Drainage District) before electric service to the complex could be completed.[1]

Neither party requested an evidentiary hearing and the appeal was submitted on the record without any supplementation to the appeal file.

---

[1] The correspondence in the appeal file indicates that Wellton-Mohawk Irrigation and Drainage District of Wellton, Arizona, operated a power company which is the serving utility for electrical power involved in this appeal. On Jan. 26, 1979, in a letter addressed to Mr. Jake Arguelle, Chief of Construction, Regional Office, U.S. Fish and Wildlife Service, Albuquerque, New Mexico, the manager of the utility, Mr. C. L. Gould, wrote a letter, with a copy to the president of appellant, setting forth the required deposit in order to accomplish the electrical service on the project.

The Government submitted a brief. The appellant did not.

Discussion

The specifications, in pertinent part, provided as follows:

> *SECTION 16100—ELECTRICAL SCOPE OF WORK*
>
> The work shall include labor, material and equipment necessary for a complete and proper working installation of the electrical systems indicated on the drawing and specifications. The work shall include, but is not limited to:
>
> Electric service, disconnects and provisions for metering *as required by the serving utility.* [Italics supplied.]

Plate 8 of the drawings prepared by the architects, entitled, "Imperial N.W.R. Utilities General Site Plan," contained the following notes pertaining to the electrical installation:

> At Pole # 7 both electrical and telephone lines drop & continue underground into project.
>
> All exist. overhead elec. & phone lines & all exist. poles beyond pole # 7 to be removed.
>
> Provide U.G. electric to conc. pad *per utility company requirements*—connect underground service to existing buildings. [Italics supplied.]

The appellant, among other things, stated in its complaint the following:

> At best, the specifications are vague, incomplete and inconsistent.
>
> * * * * *
>
> It is our contention that we had no way of knowing or finding the ultimate cost or policy relating to this installation which was only formulated on January 26, 1979; and we had no way of knowing that the District [Wellton-Mohawk Irrigation and Drainage District] policy, announced coincidentally with the announcement of its installation policy, would require trenching, bedding sand and back-fill to be furnished and accomplished by others.

The Government by its answer denied the allegations of the complaint; for its first affirmative defense, alleged that appellant was required by the electrical specifications to provide the necessary electrical service to the project; and by its second affirmative defense, asserted that prior to bid opening, appellant should have informed the Government of the existence of any ambiguity in the bid documents, and any problems it had obtaining utility connection information.

From our reading of the plans and specifications, we find no ambiguity or vagueness therein as alleged by appellant. We find, instead, that they clearly put potential contractors on notice that certain requirements for the electrical installation portion of the contract by the serving electric utility may involve additional costs, and before submitting a bid it might behoove them to determine what such costs might be.

The appellant has neither alleged nor proved that the Government possessed any superior knowledge over that of the appellant regarding the policy or requirements of the serving utility pertaining to the electrical service installation, nor, that the Government was in any better position than appellant to ascertain such information. Likewise, appellant has offered no proof and has cited no legal authority for the inference in its complaint that the Government was somehow responsible for the cost of compliance with the Wellton-Mohawk Power Company's installation requirements.

We find no legal significance in the fact that appellant received various and conflicting versions or stories regarding what the power company policy or requirements might be prior to the official policy letter of Jan. 26, 1979, received from the manager.[2]

In addition, we see no legal significance in the fact that the manager did not write the policy letter for the power company specifying the installation requirement until his return from an extended period away from the office. The appellant has admitted that prior to submitting its bid, it had knowledge of the need for determining what the electrical requirements were going to be by virtue of the additional language in its complaint on page 2 thereof as follows:

> When the job was bid, however, no cost data or pertinent information regarding electrical power or the source thereof was available. Neither we nor our electrical bidders could even find someone within the Wellton-Mohawk Power Company to talk to, much less find out what would be necessary to comply with the architect's requirements. It was not until almost three months later that someone within the Wellton-Mohawk Power Company was available to tell us what, precisly, would be involved to accomplish this project.

The Court of Claims has held that where a contractor, at the time it signed the contract, was aware that its bid was based upon incomplete information, cannot complain when it knows of added costs and allows its bid to stand. *Highway Products, Inc.* v. *United States*, 208 Ct. Cl. 926, 943 (1976). The same Court also held in substance that if a contractor embarked on a ruinous course of action with its eyes wide open, it did not act reasonably and the Board rightly denied its claim. *Wickham Contracting Co., Inc.* v. *United States*, 212 Ct. Cl. 318, 328, 329 (1976).

---

[2] The pertinent parts of that letter are quoted as follows:

"The problem has its beginning in the fact that we are replacing an existing overhead facility with an underground installation. There being no new customers or extensions, the District has no reason to do this work, therefore it becomes a direct request of the consumer for his particular interest. Under these conditions our added costs become a direct non-refundable charge to the consumer.

"A brief summary of the details will show development of the deposit required to accomplish this work:

"*CONSTRUCTION COST*

New Material	$6, 930
Less Reused Material	(600)
	$6, 330
New Construction Labor	$4, 697
Remove Old Facility	912
Labor Total	$5, 609
Total Material & Labor	$11, 939
Less Material Cost	(6, 330)
Required Non-Refundable Deposit	$5, 609

"The District policy on a job of this type is for the contractor to supply the trenching, bedding sand and backfill.

"The job consists of converting about 2,500 feet of three phase, 7200/12470 volt overhead construction to underground. Associated with this task is the necessity to supply the distribution of underground secondary at 120/240 volts as required."

Based upon the evidence submitted and the foregoing authorities, we find that the contractor here acted unreasonably in not ascertaining itself or inquiring from the Government, prior to signing the contract, what, if any, costs might be involved in complying with the utility company requirements. In these circumstances, it assumed the risk and has no legal basis to claim reimbursement from the Government.

DECISION

Accordingly, we hold that the appellant has failed to establish entitlement to its claim for $5,609, or for any other amount, and the appeal is denied.

David Doane
Administrative Judge

I concur:

William F. McGraw
Chief Administrative Judge

U.S. GOVERNMENT PRINTING OFFICE : 1980 O - 325-835 : QL 3

APPEAL OF BRISTOL BAY NATIVE CORP.*

4 ANCAB 355

Decided *July 31, 1980*

Motion of the Bureau of Land Management for reconsideration of the Final Order of the Alaska Native Claims Appeal Board in Appeal of Bristol Bay Native Corp., 4 ANCAB 222, 87 I.D. 164 (1980) [VLS 80-2], granted. Request of Bristol Bay Native Corp. for clarification and for reconsideration and amendment of order granted in part, denied in part.

Final Order affirmed in part, modified in part.

1. Alaska Native Claims Settlement Act: Administrative Procedure: Decision to Issue Conveyance—Alaska Native Claims Settlement Act: Administrative Procedure: Publication

When the Bureau of Land Management redetermines its own finding of navigability which would result in a change from its published Decision to Issue Conveyance, and when the Bureau of Land Management has, or is given, jurisdiction to make such redetermination, then that redetermination is itself a decision requiring public notice through publication in accordance with 43 CFR 2650.7.

2. Alaska Native Claims Settlement Act: Administrative Procedure: Decision to Issue Conveyance—Alaska Native Claims Settlement Act: Administrative Procedure: Publication

Redetermination by the Bureau of Land Management of navigability of water bodies while jurisdiction over the subject water bodies is in the Alaska Native Claims Appeal Board is not a "decision" of the Bureau of Land Management, and notice thereof is not required to be published pursuant to 43 CFR 2650.7.

3. Alaska Native Claims Settlement Act: Navigable Waters—Alaska: Navigable Waters: Generally

Where the Bureau of Land Management has redetermined that water bodies which are the subject of an appeal are navigable, and where the Board finds that the facts in the record upon which the Bureau of Land Management made its redetermination meet the essential elements of navigability, and where the facts in the record are undisputed so that no issue of fact as to navigability remains before the Board, then the Board will find the water bodies to be navigable.

4. Alaska Native Claims Settlement Act: Administrative Procedure: Decision to Issue Conveyance—Alaska Native Claims Settlement Act: Administrative Procedure: Publication

Decisions by the Alaska Native Claims Appeal Board, made pursuant to its authority in 43 CFR 4.1(b)(5), are not decisions of the Bureau of Land Management, and notice thereof is not required to be published pursuant to 43 CFR 2650.7.

5. Alaska Native Claims Settlement Act: Administrative Procedure: Decision to Issue Conveyance—Alaska Native Claims Settlement Act: Administrative Procedure: Publication

Redetermination by the Bureau of Land Management from nonnavigability to navigability of water bodies not the subject of an appeal is a decision "proposing to convey lands," and notice thereof must be given pursuant to 43 CFR 2650.7(d).

---

*Not in chronological order.

APPEARANCES: Thomas S. Gingras, Esq., on behalf of Bristol Bay Native Corporation; Robert C. Babson, Esq., Office of the Regional Solicitor, on behalf of the Bureau of Land Management; James T. Brennan, Esq., Hedland, Fleischer and Friedman, on behalf of Alaska Peninsula Corporation.

OPINION BY ALASKA NATIVE CLAIMS APPEAL BOARD

SUMMARY OF APPEAL

This reconsideration concerns a situation in which the Bureau of Land Management found two water bodies to be nonnavigable and published a Decision to Issue Conveyance reflecting that finding. The finding was appealed. Upon review of its own record, the Bureau of Land Management notified the parties to the appeal it had redetermined its own finding. At this point in the proceeding, the Bureau of Land Management and the appellant agreed the water bodies were navigable, while the published Decision to Issue Conveyance reflected that the water bodies were not navigable.

The Board, by Final Order, dismissed the appeal and ordered the Bureau of Land Management to amend the Decision to Issue Conveyance to reflect its redetermination of navigability, and to give public notice through publication pursuant to 43 CFR 2650.7. Both the Bureau of Land Management and appellant objected to the Board's order to give public notice. The Bureau of Land Management argued that a redetermination of an issue under appeal was not a decision requiring publication.

The Board, in issuing its Final Order, intended to return jurisdiction to the Bureau of Land Management so that the decision to exclude the water bodies would have been that of the Bureau of Land Management, and would have been within the Bureau of Land Management's jurisdiction to make. The Board restates its previous finding to clarify that the Bureau of Land Management must give public notice of its own redetermination after publication of a Decision to Issue Conveyance only when it has jurisdiction to make such redetermination. At the same time the Board finds an alternative to dismissal and republication. The Board finds that under certain circumstances, upon notice of an internal redetermination of navigability by the Bureau of Land Management of a water body under appeal, the Board may rule on the record rather than return jurisdiction to the Bureau of Land Management for a new publishable decision.

JURISDICTION

The Alaska Native Claims Appeal Board, pursuant to delegation of authority in the Alaska Native Claims Settlement Act, 85 Stat. 688, *as amended*, 43 U.S.C. §§ 1601–1628 (1976 and Supp. I 1977), and the implementing regulations in 43 CFR Part 2650 and 43 CFR Part 4, Subpart J, hereby makes the follow-

g findings, conclusions and Deci-
on.

PROCEDURAL BACKGROUND

The above-referenced decision of
e Bureau of Land Management
BLM) approved the conveyance
Kokhanok Native Corp. (Kokha-
ok) of the surface estate of cer-
in specified lands and conveyance
f the subsurface estate of the same
nd to Bristol Bay Native Corp.
BBNC).

On Jan. 11, 1980, BBNC appealed
id decision "insofar as it (1) con-
titutes a determination that Gi-
raltar Lake and Kokhanok Lake
re non-navigable and (2) purports
charge the land submerged be-
eath those lakes against BBNC's
creage entitlement under Sections
2(a) and 14(f) of the Alaska
ative Claims Settlement Act."

Subsequently, while the appeal
vas pending, the Alaska State Di-
ector, BLM, concurred in two
eparate BLM redeterminations
hat Kokhanok Lake, Gibraltar
ake, and several other water
odies are navigable. The BLM ac-
ordingly on Mar. 11, 1980, filed a
equest for final order, which re-
uest stated that no dispute remains
mong the parties to the appeal and
hat the Board's issuance of a final
rder directing interim conveyance
(IC) would be appropriate. The
equest, as modified on Apr. 1, 1980,
uggested the exclusion from the
IC of the submerged lands under-
ying Kokhanok Lake, Gibraltar
Lake, and the several other water bodies newly determined to be navigable, on the basis that such submerged lands are not considered "public lands." BLM's request also indicated that, following such exclusion, the acreage of the submerged lands underlying the specified water bodies would not be charged against BBNC's or Igiugig Native Corporation's acreage entitlement under the Alaska Native Claims Settlement Act (ANCSA).

BBNC concurred in the BLM's motion except to point out that reference should have been made to Kokhanok Native Corporation or Alaska Peninsula Corp. (APC), with which Kokhanok has merged, rather than to Igiugig Native Corp.

APC subsequently appeared and, referring only to Gibraltar Creek (one of the water bodies newly determined navigable), stated that it did not oppose the redetermination nor its inclusion in the final order, if such had no effect on the reservation of easements contained in the Decision to Issue Conveyance (DIC). BLM responded that it does not, as a result of any of the navigability redeterminations filed with the Board as of Apr. 1, 1980, propose to seek any easements not already proposed in the DIC.

The Board, in its Final Order issued May 6, 1980, ruled that BLM's redetermination of the navigability of Kokhanok Lake and Gibraltar Lake, when put into effect, would obviate the basis for the appeal and eliminate all the issues therein. Finding that no reasons justifying the continuance of the appeal were apparent, the Board dismissed the appeal. In so doing, the Board held that any redetermination of navigability which modifies a published decision is in itself a decision requiring publication in accordance with the provisions of 43 CFR 2650.7.[1] The Board also noted, in regard to APC's request that a redetermination of Gibraltar Creek as navigable not result in new easements, that public easements are established pursuant to statutory and regulatory requirements, that they are not a matter which can be disposed of through stipulation by parties to an appeal, and that the BLM is authorized and obligated, upon redetermination, to establish any additional easements required by law.

The BLM, arguing that the publication requirements of 43 CFR 2650.7(d) are not applicable to its subject redeterminations of navigability, moved for reconsideration of the Board's final Order. As to water bodies which are the subject of appeal, BLM argued that the requirements of 43 CFR 2650.7(d) are not applicable because BLM's redetermination represents an admission by BLM of the substantive merits of the appeal and is not a "decision by the Bureau" required by 43 CFR 2650.7(d) to be published. As to water bodies which are not the subject of appeal, where the BLM's redetermination is from nonnavigable to navigable, the BLM argued that 43 CFR 2650.7(d) is not applicable because the redetermination constitutes a decision *not* to convey the submerged lands underlying the water bodies.

BBNC filed a document entitled Statement of Position; Request for Clarification; and Request for Reconsideration and Amendment of Order. Therein, BBNC stated its understanding of what BLM had stated with regard to BLM's not proposing any additional easements as a result of navigability redeterminations filed with the Board as of Apr. 1, 1980. BBNC requested that the Board, "[i]n the interests of clarity, * * * require BLM to state whether its (BBNC's) understanding is correct."

BBNC also requested that the Board reconsider its order requiring republication as to the water bodies appealed by BBNC. BBNC argued that BLM's "redetermination" as to Kokhanok and Gibraltar Lakes is nothing more than a concession of the merits of BBNC's appeal, and should be so treated by the Board. BBNC argued that this variety of "redetermination" should not require republication.

DECISION

As to water bodies which are the subject of appeal, BLM's argu-

---

[1] Sec. (d) of 43 CFR 2650.7 provides in pertinent part:

"For all land selections made under the act [ANCSA], in order to give * * * [constructive] notice of the decision of the Bureau of Land Management proposing to convey lands, * * * notice of the decision shall be published once in the FEDERAL REGISTER and, once a week, for four (4) consecutive weeks, in one or more newspapers of general circulation in the State of Alaska nearest the locality where the land affected by the decision is situated, if possible."

nt concerning publication re-
rements pursuant to 43 CFR
0.7 is correct insofar as it goes.
Board is fully aware that re-
ermination of an issue under ap-
l is not a decision by the Bureau
that term is used in 43 CFR
0.7. When an appeal from a BLM
ision to Issue Conveyance
IC) is filed with the Board, jur-
ction over the land covered by
decision passes from the BLM
he Board. The BLM lacks juris-
ion over an issue under appeal,
cannot, during the pendency of
ppeal, make a new final decision
the Department concerning such
e. It can, and properly did in
appeal, notify the Board and
ies of the result of its own in-
al review process, an action
ch might properly be typified an
ission of the substantive merits
his appeal. The only question
is how such notification, or ad-
ion, should be translated into
action on behalf of the Depart-
t of the Interior, and what ac-
, including publication, is re-
ed of BLM.

LM's arguments ignore the ef-
of the Board's Final Order in
appeal. Aware that BLM lacks
diction to make a new decision
issue under appeal, the Board
issed the appeal by order dated
6, 1980. By dismissing the ap-
the Board returned jurisdic-
to BLM for actions appropri-
BLM's assertions that it had
nally redetermined its position
he navigability of the water
s under appeal. By this action, the Board acknowledged that BLM had the authority, once jurisdiction was returned, to correct its own error. The Board now reiterates that BLM has such authority. However, when the BLM does change its own final decision as a result of redetermination, and has jurisdiction to do so, such change falls within the meaning and intent of "decision" as that term is used in 43 CFR 2650.7(d). Therefore, the Board affirms its finding in ANCAB VLS 80-2, but because of the confusion evidenced in the arguments for reconsideration, here restates the finding to clarify any question as to jurisdiction.

[1] When the Bureau of Land Management redetermines its own finding of navigability which would result in a change from its published DIC, and when the BLM has or is given jurisdiction to make such redetermination, then that redetermination is itself a decision requiring public notice through publication in accordance with 43 CFR 2650.7.

[2] The Board also finds, for purposes of clarification, that redetermination by the BLM of navigability of water bodies while jurisdiction over such water bodies is in the Alaska Native Claims Appeal Board is not a "decision" of the BLM, and notice is not required to be published pursuant to 43 CFR 2650.7.

When BLM does notify parties that it has, as an internal matter, redetermined navigability of a water body under appeal, the

Board finds there is an alternative to dismissing the appeal and returning jurisdiction to the BLM for publication of its own new finding. Under certain narrow circumstances it is appropriate for the Board to make its own ruling on the record, rather than return jurisdiction to BLM.

[3] Where the BLM has redetermined that water bodies which are the subject of an appeal pending before the Board are navigable, and where the Board finds that the facts in the record upon which BLM made its redetermination meet the essential elements of navigability enunciated in *Appeal of Doyon, Ltd.*, 4 ANCAB 50, 86 I.D. 692 (1979) [RLS 76-2], and where the facts in the record are undisputed so that no issue of fact as to navigability remains before the Board, then the Board will find the water bodies to be navigable.

In this appeal, the Board finds that the record upon which BLM relied for its redetermination presents facts concerning the use and susceptibility of use of Kokhanok Lake and Gibraltar Lake which meet the essential elements of navigability enunciated in *Appeal of Doyon, Ltd., supra.* The Board further finds that the record discloses no dispute to the facts alleged in support of a finding of navigability.

[4] Accordingly, the Board finds Kokhanok Lake and Gibraltar Lake to be navigable. As the Board has authority under 43 CFR 4.1(b)(5) to "consider and decide finally for the Department appeals to the head of the Department," such finding is not a decision of the BLM, and notice thereof is not required to be published pursuant to 43 CFR 2650.7.

As to water bodies not the subject of appeal, the Board is not persuaded by the BLM's argument that since the effect of a redetermination from nonnavigable to navigable is to exclude the underlying submerged lands from the proposed conveyance, such a redetermination is a decision proposing not to convey lands as distinguished from a decision proposing to convey lands. Only the latter is argued to be within the notice publication requirements of 43 CFR 2650.7(d).

The water bodies and the redetermination of navigability thereof are actually part of a broader decision, in this instance BLM Decision AA-6673-A through AA-6673-K. The redetermination of the water bodies as navigable and the decision to exclude the underlying lands from a conveyance under ANCSA is a modification of, and amendment to, a published BLM decision to convey certain lands pursuant to the selection application of Kokhanok Native Corp. Accordingly, notice of such modification must be published pursuant to 43 CFR 2650.7(d).

[5] BLM redetermination from nonnavigable to navigable of water bodies not the subject of appeal, in conjunction with the decision not to convey the submerged lands underlying the water bodies, is a decision "proposing to convey lands,"

of which must be given pur-
to 43 CFR 2650.7(d).
NC's request for clarification
eby denied. The statement of
LM which BBNC seeks to
larified dealt with the neces-
of creating additional ease-
consequent to BLM redeter-
ion of navigability of a water
not the subject of this appeal.
dingly, the statement is not
n the scope of this appeal, and
t properly the subject of an
of the Board for clarification.
request for clarification should
rected at the party making the
nent rather than at the Board.

ORDER

e BLM is therefore Ordered to
de the submerged lands under-
Kokhanok Lake and Gibral-
Lake from conveyance under
SA to Alaska Peninsula Corp.
to Bristol Bay Native Corp.
ce of such exclusion need not be
ished under 43 CFR 2650.7.
I is further Ordered to publish
e, pursuant to 43 CFR 2650.7,
ny redetermination of naviga-
y of water bodies within the
tion area other than Kokhanok
e and Gibraltar Lake.

his represents a unanimous
sion of the Board.

JUDITH M. BRADY
Administrative Judge

ABIGAIL F. DUNNING
Administrative Judge

JOSEPH A. BALDWIN
Administrative Judge

DRUMMOND COAL CO.

2 IBSMA 189

Decided *August 6, 1980*

Petition for discretionary review filed by the Office of Surface Mining Reclamation and Enforcement from an Apr. 2, 1980, decision by Administrative Law Judge David Torbett in Docket Nos. NX 0-21-P and NX 0-22-P, vacating Notice of Violation No. 79-II-58-15 and reducing the civil penalties assessed for Notice of Violation No. 79-II-58-16.

Affirmed in part, reversed in part, and remanded.

1. Surface Mining Control and Reclamation Act of 1977: Tipples and Processing Plants: In Connection With—Surface Mining Control and Reclamation Act of 1977: Words and Phrases

"Surface coal mining operations." Where a coal processing facility is owned and operated by the same company that owns and operates the mine supplying most of the coal to the facility, that facility is operated "in connection with" a surface coal mine within the meaning of "surface coal mining operations" in 30 CFR 700.5 under the circumstances of this case.

2. Surface Mining Control and Reclamation Act of 1977: Tipples and Processing Plants: At or Near a Minesite—Surface Mining Control and Reclamation Act of 1977: Words and Phrases

"Surface coal mining operations." Where a coal processing facility is found to be operated in connection with a surface coal mine and is located less than 15 miles

from three active surface mining pits, that facility is "near" the minesite within the meaning of "surface coal mining operations" in 30 CFR 700.5 under the circumstances of this case.

APPEARANCES: Charles P. Gault, Esq., Office of the Field Solicitor, Knoxville, Tennessee, Mark Squillace, Esq., and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement; Richard E. Dick, Esq., Jasper, Alabama, for Drummond Coal Company.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

The Office of Surface Mining Reclamation and Enforcement (OSM) has sought review of the Apr. 2, 1980, decision of Administrative Law Judge (Judge) David Torbett that OSM lacked authority under the Surface Mining Control and Reclamation Act of 1977 (Act)[1] to regulate Drummond Coal Company's (Drummond's) Kellerman preparation plant and that the civil penalties assessed for violations at Drummond's Kellerman Pit #2 should be reduced. For the reasons discussed below, we reverse the conclusion that OSM was without authority to regulate the preparation plant and remand the case to the Hearings Division for a determination as to the validity of the civil penalties assessed against that facility. However, we affirm the decision on the civil penalties assessed against Pit #2.

Background

On June 7 and 12, 1979, OSM inspected Drummond's Kellerman preparation plant, and surface mine[2] in Tuscaloosa County, Alabama. The Kellerman preparation plant, located on the bank of the Black Warrior River, processes and loads coal from three active pits for river barge shipment. Both the plant and the pits are owned and operated by Drummond; the pits are also permitted to Drummond. The three pits are located approximately 7–8, 9–10, and 15 miles from the preparation plant. Drummond's preparation plant also loads coal from Jim Walters Resources, a neighboring mine, under contract with that operation.

As a result of the inspection, OSM issued two notices of violation to Drummond. Notice of Violation No. 79–II–58–15 alleged five violations at the preparation plant: four violations of the sedimentation pond and water quality standards of 30 CFR 715.17 and one violation of the sign requirements of 30 CFR 715.12. Notice of Violation No. 79–II–58–16 alleged two violations at Pit #2: a violation of the sedimentation pond requirements of 30 CFR 715.17 and a failure, by maintaining a coal stockpile off the permit area, to have all portions of the surface coal mining operation on its permit in accordance with sec. 502 of the Act (30 U.S.C. § 1252 (Supp. I 1977)).

---

[1] Act of Aug. 3, 1977, 91 Stat. 445, 30 U.S.C. §§ 1201–1328 (Supp. I 1977).

[2] There are three active pits at the "mine." It is unclear from the record whether these pits are separate surface mines or whether they are part of the same mining operation. The Board attaches no significance to whether one or three mines are involved in this case.

After receiving notification of the proposed civil penalties on these notices, Drummond requested an assessment conference, which was held on Oct. 11, 1979. Following the conclusion of the conference, Drummond filed for review with the Hearings Division. A hearing was held on Feb. 27, 1980.[3] On Apr. 2, 1980, the Judge confirmed in writing his ruling from the bench which had vacated Notice of Violation No. 79–II–58–15 and sustained Notice of Violation No. 79–II–58–16, but reduced the civil penalties assessed for that notice. OSM petitioned for discretionary review of this decision and filed a brief. Drummond did not file a brief.

Discussion and Conclusions

[1] In *Drummond Coal Co.*, 2 IBSMA 96, 101, 87 I.D. 196, 198 (1980) (*Drummond I*), the Board held that a "coal processing facility * * * owned by a company that supplies that facility from several mines owned by the same company" is operated "in connection with" those mines for the purposes of the definition of surface coal mining operations in 30 CFR 700.5.[4] This case presents essentially the same factual situation. Drummond owns and operates both the preparation plant and the pits which supply coal to it. The one distinction in this case is that Drummond's preparation plant also has a contract to load coal for a neighboring mine that lacks adequate loading facilities. This fact does not alter the common ownership and use connection between the preparation plant and the pits. Therefore, we hold that the Kellerman preparation plant is operated in connection with Drummond's surface mine within the meaning of 30 CFR 700.5.

[2] The Board also held in *Drummond I* that the processing facility, which was 9–30 miles away from the functionally integrated and commonly owned mines supplying it, was "near" those mines within the meaning of 30 CFR 700.5. Here, the active pits are similarly related and owned and are all less than 15 miles from the preparation plant.[5] The

---

[3] At the hearing, Drummond based its case against Notice of Violation No. 79–II–58–15 on OSM's lack of authority to regulate the preparation plant. Other evidence presented dealt with mitigating circumstances that might justify vacation of or reductions in the proposed civil penalties for both notices.

[4] 30 CFR 700.5 reads in pertinent part:

"*Surface coal mining operations* means—

"(a) *Activities conducted* on the surface of lands *in connection with a surface coal mine* or, subject to the requirements of Section 516 of the Act, surface operations and surface impacts incident to an underground coal mine, the products of which enter commerce or the operations of which directly or indirectly affect interstate commerce. Such activities include excavation for the purpose of obtaining coal, including such common methods as contour, strip, auger, mountaintop removal, box cut, open pit, and area mining, the uses of explosives and blasting, and in situ distillation or retorting, leaching or other chemical or physical processing, and the cleaning, concentrating, or other processing or preparation, loading of coal for interstate commerce *at or near the mine-site.*" (Italics added.)

[5] Because of the disposition of this case and of *Drummond I*, the Board finds it irrelevant whether coal is transported from a mine to a preparation plant over private roads.

preparation plant is, therefore, "near" those pits within the meaning of 30 CFR 700.5.[6]

Because of the Board's conclusion that the Kellerman preparation plant is operated in connection with Drummond's Kellerman surface mine and is near that mine, the plant is subject to regulation by OSM. The decision of the Administrative Law Judge vacating the notice of violation on the grounds that OSM lacked authority to regulate that facility is reversed. The case is remanded to the Hearings Division for a determination of the validity of the civil penalties assessed on that notice.

OSM also sought review of the Judge's reduction of the civil penalties assessed on Notice of Violation No. 79-II-58-16, relating to the two violations at Kellerman Pit #2. The Board sees no reason to disturb the finding below that these civil penalties should be reduced. The Judge's decision is affirmed.

Therefore, the Apr. 2, 1980, decision of the Hearings Division is affirmed in part, reversed in part, and remanded for further proceedings not inconsistent with this decision.

NEWTON FRISHBERG
Administrative Judge

WILL A. IRWIN
Chief Administrative Judge

MELVIN J. MIRKIN
Administrative Judge

---

[6] As we pointed out in *Drummond I*, "near" is a relative term, depending for its interpretation on the circumstances of each case.

J. BURTON TUTTLE

49 IBLA 278

Decided *August 18, 1980*

Appeal from decision of the Wyoming State Office, Bureau of Land Management, rejecting offer to purchase lands. W-31177.

Reversed and remanded.

1. Federal Land Policy and Management Act of 1976: Rules and Regulations—Federal Land Policy and Management Act of 1976: Sales—Public Sales: Preference Rights—Regulations: Interpretation

An assertion of a preference right to purchase public land offered for public sale pursuant to the Unintentional Trespass Act of Sept. 26, 1968, 82 Stat. 870 (43 U.S.C. §§ 1431-1435 (1976)) (now covered by the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701, 1722 (1976)), is improperly rejected when the applicant submits satisfactory equitable proof of his "ownership" of contiguous lands by showing that he has contracted to purchase such land, has made at least partial payment, therefor, and is in possession thereof.

Robert A. Davidson, 13 IBLA 368 (1973), overruled to the extent it is inconsistent.

APPEARANCES: J. Burton Tuttle, *pro se.*

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

INTERIOR BOARD OF LAND APPEALS

This appeal is taken from a decision dated Nov. 26, 1979, by the

Wyoming State Office, Bureau of Land Management (BLM), rejecting appellant's offer to purchase the following described lands: lot 2, sec. 4, T. 18 N., R. 88 W., sixth principal meridian, Wyoming.

The tract was offered for sale pursuant to the Unintentional Trespass Act (UTA) of Sept. 26, 1968, 82 Stat. 870, 43 U.S.C. §§ 1431–1435 (1976). UTA authorized the Secretary of the Interior to sell at public auction a tract of public land where such land was not needed for public purposes and upon which there was an unintentional trespass on or before Sept. 26, 1968. It also accorded owners of contiguous lands a preference right to buy such land. Sec. 214 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701, 1722 (1976), carried forth the objectives of the Act of Sept. 26, 1968, as follows:

> (a) Preference right of contiguous landowners; offering price
>
> Notwithstanding the provisions of the Act of September 26, 1968, [43 U.S.C. §§ 1431–35 (1976)] hereinafter called the "1968 Act", with respect to applications under the 1968 Act which were pending before the Secretary as of the effective date of this subsection and which he approves for sale under the criteria prescribed by the 1968 Act, he shall give the right of first refusal to those having a preference right under section 2 of the 1968 Act * * *. The Secretary shall offer such lands to such preference right holders at their fair market value (exclusive of any values added to the land by such holders and their predecessors in interest) as determined by the Secretary as of September 26, 1973.

Appellant herein asserted a preference right to purchase the tract in question. The governing regulation, 43 CFR 2711.4(b)(2), states:

> (2) Each preference-right applicant must, within the time specified by the authorized officer, or such extensions of time as he may grant; submit proof of ownership of the whole title to the contiguous lands, that is, he must show that he had the whole title in fee on the last day of the 30-day period. The authorized officer will specify that date. Such proof must consist of (i) *a certificate of the local recorder of deeds, or* (ii) *an abstract of title or a certificate of title* prepared and certified by a title company or by an abstracting company, or by a duly qualified attorney authorized to practice in the State stating on the basis of an examination of title records that the applicant owned adjoining land in fee simple on the last day of the 30-day period. If the preference-right applicant does not own adjoining land at the close of the preference-right period, his preference-right claim will be lost. After a case has been closed, the data filed pursuant to this section may be returned by the authorized officer. [Italics added.]

The decision appealed from rejected appellant's application as follows:

> Proof of ownership filed by J. Burton Tuttle established the fact that he owns equitable title to contiguous lands, however he is not the landowner of record of any lands contiguous to the parcel of public land being offered for sale. * * *
>
> The acceptance of offer of sale submitted by J. Burton Tuttle must therefore be and is hereby rejected because he does not qualify as a preference right holder as defined by * * * 43 CFR 2711.4.

The decision does not elaborate how appellant's asserted preference right status failed to conform with the regulation. The record, however, contains a land sale contract, dated Dec. 11, 1974, by which James A. and Mary Helen Chapman agreed to sell to appellant herein certain lands including those upon which appellant bases his preference right status. The agreement incorporates a general warranty deed and lists a total purchase price of $645,325, part of which was payable in five annual installments beginning on Dec. 11, 1975. In the event of breach of the buyer, the agreement accorded the seller the right to retain all money theretofore paid, and the right to reenter the lands, dispossessing the buyer.

On May 2, 1979, BLM published a notice requiring adjoining owners "claiming any right, title, or interest in * * * [the land in issue to] notify * * * [BLM] within forty-five (45) days, from the date of this notice."

On May 11, 1979, appellant filed with BLM an acceptance of offer of sale, including a statement by a duly qualified attorney authorized to practice in the state that he was the owner in fee simple of lands contiguous to the parcel being offered for sale. *See* 43 CFR 2711.4(b). On May 25, 1979, the city of Rawlins, Wyoming, also filed an acceptance asserting ownership of contiguous lands.[1] On July 9 BLM requested the county clerk of Carbon County, to verify that appellant owned contiguous lands. The county clerk's response filed on July 26 reads: "Our last title of record shows that the above described land is listed in the name of James and Helen Chapman." BLM then telephoned appellant and was made aware of his contract to purchase lands from the Chapmans.

It is for these reasons that BLM rejected the appellant's acceptance of the offer to sell.

In his statement of reasons appellant asserts that the term "whole title" in the regulation was meant to exclude lessees, remainderman, or life tenants from the status of preference right holders. Appellant also cites authorities for his position that the term "fee simple" has never been used to distinguish between legal and equitable estates, that equitable estates, are to all intents and purposes, legal estates.

[1] In *Robert A. Davidson*, 13 IBLA 368, 370 (1973), the appellant similarly claimed preference right status by virtue of a land sale contract on which only a small fraction of the purchase price remained to be paid. The county clerk and recorder there certified to BLM that the seller of the contiguous lands in question was the sole owner in fee simple. Addressing 43 CFR 2711.4 (b)(2) the Board stated:

> The regulation was worded as set forth above so that the personnel in the State Office will not be required to construe and rule upon claims of title and contracts of sale. It is clear that the certificate of the local recorder of deeds, nam-

---

[1] The documents filed by the city of Rawlins on May 25, 1979, described the land in issue as "contiguous" land owned by the city. On June 19, 1979, BLM asked the city to properly execute its proof of preference right and file it by June 25, 1979. The city did so on June 26, 1979.

> ing * * * [the seller] as the owner of the contiguous land in issue, is insufficient.

In *Dudley S. Long*, 16 IBLA 18 (1974), purchasers under a land sale contract asserted a preference right with the permission of the vendors of the contiguous lands. The Board held that the purchasers' status was inadequate to establish such preference right.

At first blush, *Davidson* seems to be dispositive of this case. However, our further study of the basic issue delineated here impels us to a contrary conclusion.

In *Carter Blatchford*, 53 I.D. 613 (1932), the Department held that a purchaser in possession under a contract to purchase is an owner within the contemplation of sec. 3 of the Act of Feb. 27, 1925 (43 Stat. 1013), relating to the division of erroneously meandered lands in Wisconsin among the owners of adjoining and surrounding tracts, stating:

> A purchaser in possession by a contract to sell has the equitable title, the vendor having the mere right to retain the legal title as security for any unpaid balance of the agreed purchase price. *See Williams* v. *United States* (138 U.S. 514, 516); *Boone* v. *Chiles* (10 Pet. 177, 224). [53 I.D. at 614.]

In *Roberts* v. *Osburn*, 2 Kan. 90, 589 P.2d 985, 991 (1979), the court stated as follows:

> "The intention of the parties is the factor in any proper decision. Parties do not frequently make express provisions as to risk, but they do indicate whether they intend a present transfer of the rights of ownership or a future transfer, and there should be no doubt that they expect all the incidents of ownership to pass from the seller to the buyer at that time. That time will frequently not be when the legal title is transferred. If, as frequently happens, a purchaser is given immediate possession under his contract, with the right to use the property as his own to the same extent as is customary with a mortgagor, the title is retained merely as security for payment of the price. It is a short way and in many states a common way of accomplishing the same end that would be achieved by conveying to the purchaser and taking back a mortgage. *When by the contract the beneficial incidents of ownership are to pass is the time which the parties must regard as the moment of transfer. This is the time when the purchaser is held to become the 'owner,'* under alienation clauses in insurance policies, and no little authority supports the conclusion that then, and not before, the risk passes to the vendee." *Torluemke*, 174 Kan. at 671, 258 P.2d at 284. [Italics supplied.] [Citing Williston on Contracts.]

There are several cases from other jurisdictions that distinguish between equitable and legal ownership. In *County of Los Angeles* v. *Butcher*, 155 Cal.App.2d 744, 318 P.2d 838 (1957), it was said:

> "From the foregoing authorities it is clear that where parties enter into a written contract for the purchase and sale of real property pursuant to which the buyer goes into possession and the seller retains the legal title as security for the purchase price, the latter 'has no greater rights than he would possess if he had conveyed the land and taken back a mortgage' and the purchaser 'is for all purposes the owner.' [Citations omitted.]" p. 747, 318 P.2d p. 840.

In *Hartman* v. *Hartman*, 11 Ill.App.3d 524, 297 N.E.2d 199 (1973), the same principle was announced and followed when the court said:

> "Under the doctrine of equitable conversion upon the execution of a valid, enforceable contract for the sale of realty,

> the purchaser becomes the equitable owner of the realty holding the purchase money as trustee for the seller. The seller becomes trustee of the legal title for the purchaser with a lien on the land as security for the purchase money." pp. 527–528, 297 N.E.2d p. 202.
>
> A few of the cases from other jurisdictions where this concept has been applied include: *Davis* v. *Rio Rancho Estates, Inc.*, 401 F.Supp. 1045 (S.D.N.Y. 1975); *United States* v. *Giwosky*, 349 F.Supp. 1200 (E.D. Wis. 1972); *Shreeve* v. *Greer*, 65 Ariz. 35, 173 P.2d 641 (1946); *Trickey* v. *Zumwalt*, 83 N.M. 278, 491 P.2d 166 (1971); *Reynolds Aluminum* v. *Multnomah Co.*, 206 Or. 602, 287 P.2d 921 (1955); *Jakober* v. *Loew's Theatre, Etc.*, 107 R.I. 104, 265 A.2d 429 (1970); *Committee* v. *Val Vue Sewer Dist.*, 14 Wash. App. 838, 545 P.2d 42 (1976). The United States Supreme Court has applied the same principle in holding that realty sold on contract by the United States to private individuals or corporations is subject to state and local taxation: *S.R.A., Inc.* v. *Minnesota*, 327 U.S. 558, 66 S.Ct. 749, 90 L.Ed. 851 (1946); *New Brunswick* v. *United States*, 276 U.S. 547, 48 S.Ct. 371, 72 L.Ed. 693 (1928). See also 91 *C.J.S.*, Vendor & Purchaser § 106.

The Department stated in *Howard M. Wilson*, 63 I.D. 36, 38–39 (1956):

> In common usage, "whole title" or "title in fee" contemplates ownership in fee simple, that is, ownership of an estate of inheritance as distinguished from an estate for life or for years. Such an estate excludes all restrictions or qualifications as to the persons who may inherit as heirs.

In *Wilson* the Department ruled that the Navajo Tribe held "whole title in fee" within the meaning of the regulation, since it was the beneficial owner of the surface interests in the land, although the United States held naked legal title to the land, and although the minerals were held by another, being reserved to the grantor under a deed to the United States in trust for the tribe.

Wilson establishes that this Department will look to the true beneficial ownership to determine the party entitled to a preference right under the Act and the regulations, even though the legal title resides in another. Similarly, in *Brent L. Sellick*, A–30007 (Oct. 5, 1964), a preference claim was honored although the preference claimant had transferred the legal title under a land sale contract. The Department recognized there was no transfer of the right of possession and that the legal title was conveyed by the contract merely as a security interest. Although we do not have all the details of the transaction, the holder of the equitable, beneficial interest in the land was deemed to have the "whole title in fee," even though the legal title had been conveyed as a security interest. These cases recognize that the term "whole title in fee" should not be interpreted as limiting the preference right to a person who holds the beneficial title to an estate but has passed the legal title for security.

While there are some differences between rights and obligations under a land sale contract giving the right of possession and other indicia of ownership and those where a purchaser receives a deed and conveys a mortgage, there is no reason under the governing statute for differentiating between the two situations. In the first case the purhaser receives equitable title, while n the second he receives legal title. But in both uses he is regarded as he real or beneficial owner. In both ases conditions of nonpayment to he holder of the security interest night defeat the purchaser's rights fter appropriate actions by the older of the security interest.

Dudley S. Long, *supra*, is distinguishable. The contract purchasers f contiguous land (the Emerys) imely asserted a preference right to purchase in their own behalf and endered an amount of money to meet the high bid. Later they directed BLM to transfer the deposited tender to Dudley S. Long and Veva Long. This letter stated that "[i]t was the purpose and intent to make the bid in their [the Long's] names so they would have the property." There was also included a certificate of ownership, certified by a title company, showing that on Oct. 18, 1973, the Longs were the sole owners in fee simple of the lands contiguous to the tract in issue.

In essence, the Oregon State Office ruled in the decision below that because the owners of fee title to the surrounding private lands, the Longs, did not personally offer to purchase the tract within 30 days of the auction, the preference right provided by 43 CFR 2711.4(b)(2) was lost. The decision below pointed out that though the Emery Livestock Co. and the Emerys directed the transfer of the deposit from their account to that of the Longs, the statement indicating an agency relationship existed between them had not been corroborated by the Longs at that time. *Long* was decided on the basis that we will not sanction an "after the fact" ratification to the prejudice of the Government or of third parties, *e.g.*, the high bidder. *Long*, *supra* at 22.

We are impelled to the conclusion that a person who has contracted to purchase land, has made partial payment therefor, and is in possession thereof pursuant to the contract is the "owner" thereof, within the ambit of 43 CFR 2711.4(b)(2). *Davidson* is overruled to the extent it is inconsistent with this decision.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed and the case remanded for appropriate action consistent herewith.

Frederick Fishman
Administrative Judge

We concur:

Anne Poindexter Lewis
Administrative Judge

James L. Burski
Administrative Judge

ADMINISTRATIVE JUDGE THOMPSON CONCURRING:

I agree that the Board's decision in *Robert A. Davidson*, 13 IBLA 368 (1973), should be overruled. I would also overrule to the extent it is inconsistent, *Dudley S. Long*, 16 IBLA 18 (1974). Although the

Long case rested upon an agency ground, to the extent it implies that the equitable owner of land under a land sale contract could not assert the preference right as the owner of the "whole title in fee," it should also be overturned. *Davidson* and *Long* were decided under the provisions of the regulations implementing the Public Sales Act, *as amended*, 43 U.S.C. § 1171 (1970). That Act has been repealed by sec. 703(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 90 Stat. 2790. However, the regulations pertaining to the Public Sales Act were followed in determining rights under the Unintentional Trespass Act of Sept. 26, 1968, 82 Stat. 870, *as amended* by sec. 214 of FLPMA, 43 U.S.C. § 1722 (1976).

The basic question under both statutes on who may have a preference (or right of first refusal under the amended Unintentional Trespass Act) is who is an "owner" of land contiguous to the land to be sold. Regulation 43 CFR 2711.4(b) under the Public Sales Act made applicable to the sales under the Unintentional Trespass Act (by 43 CFR 2785 (1971) requires a preference-right applicant to submit proof of "ownership of the whole title to the contiguous lands." Proof includes a certificate of the local recorder of deeds, an abstract of title or a certificate of title prepared and certified by a title company or by an abstracting company, or by a duly qualified attorney authorized to practice in the state stating "on the basis of an examination of title records that the applicant owned adjoining land in fee simple on the last day of the 30-day period." A statement was timely filed by appellant's attorney in this case that appellant was owner of contiguous lands in fee simple, however, it did not include a statement that this was based upon an examination of the records. Thereafter, supplemental information was submitted showing the contract of sale, warranty deed, and additional documents. For the reasons I expressed in my dissent in *Robert A, Davidson, supra* at 372, such clarifying proof should be accepted and the preference right acknowledged.

Because the term "owner of the whole title in fee" applicable in the Public Sales Act regulations is followed for the Unintentional Trespass Act cases, the meaning should be the same. I agree that the vendee and equitable interest holder of the fee simple title comes within the meaning of the regulations and is qualified as the owner of contiguous lands to be entitled to the right of first refusal under the Unintentional Trespass Act. My views of the proper interpretation to be given to the regulations under the Public Sales Act, which are to be applied here, were set forth in the dissent in *Robert A. Davidson, supra.* For both the procedural and substantive reasons expressed in my dissent in *Davidson* showing the history of the regulations and of pertinent Departmental decisions, I agree with the result reached in Judge Fishman's opinion and disagree with Judge Stuebing's opinion. Some of the substantive reasons I discussed in *Davidson* are reiterated in Judge Fishman's opinion. Additional reasons are given in my dissent in *Davidson* and will not be repeated here. I adhere to those views.

JOAN B. THOMPSON
Administrative Judge

ADMINISTRATIVE JUDGE STUEBING DISSENTING:

Regrettably, it will be necessary to reiterate the salient regulation in order to illustrate my difference with the majority. 43 CFR 2711.4 (b) (2) provides:

> (2) Each preference-right applicant
> nust, within the time specified by the
> uthorized officer, or such extensions of
> ime as he may grant, *submit proof of*
> *wnership of the whole title to the con-*
> *iguous lands, that is, he must show that*
> *e had the whole title in fee on the last*
> *ay of the 30-day period.* The authorized
> fficer will specify that date. Such proof
> nust consist of (i) a certificate of the
> cal recorder of deeds, or (ii) an ab-
> tract of title or a certificate of title pre-
> ared and certified by a title company or
> y an abstracting company, or by a duly
> ualified attorney authorized to practice
> the State *stating on the basis of an ex-*
> *mination of title records that the appli-*
> *nt owned adjoining land in fee simple*
> *the last day of the 30-day period.* If
> e preference-right applicant does not
> wn adjoining land at the close of the
> eference-right period, his preference-
> ght claim will be lost. After a case has
> en closed, the data filed pursuant to
> is section may be returned by the au-
> orized officer. [Italics added.]

In order to qualify for a preference right, then, the applicant must prove that he was the owner of the whole title in fee simple on the last day of the 30-day period by submitting either the certificate of the local recorder, a certificate or an abstract of title by a title insurance or abstract company, or an attorney's opinion, all or any of which *must be based upon an examination of the title records.*

The first point I wish to make is that whatever interest appellant may have had in the contiguous land at that time *was not reflected by the title records.* As noted in Judge Fishman's opinion, the county clerk of Carbon County advised BLM that, "Our last title of record * * * is listed in the name of James and Helen Chapman." Thus, it was manifestly impossible for appellant to provide the proof required by the regulation to support his claim to a preference right.

Judge Fishman's opinion states, "The record, however, contains a land sales contract, dated December 11, 1974, by which James A. and Mary Helen Chapman agreed to sell to appellant certain lands including those upon which appellant bases his preference right status." I hasten to point out that Judge Fishman's allusion to "the record" refers to the administrative record before this Board on appeal, not to the land title records of Carbon County, Wyoming. Since the opinion of the attorney which was tendered by appellant in purported compliance with 43 CFR 2711.4(b)

(2) was *not* made "on the basis of an examination of title records," as that regulation requires, BLM properly refused to recognize it. This is reason enough to affirm BLM's decision.

In *Jess R. Manuel*, A–27482 (Nov. 29, 1957), the Department encountered a form of proof which did not conform to the requirements of the regulation. In disallowing it, and the conforming proof which was later filed, the Department said:

> *The regulation plainly requires in mandatory terms* that proof of ownership be shown in one of two ways. The appellant does not contend that he qualified under (ii)(a) (*supra*), but he urges that the certificate of the Supervising Land Title Abstractor of the State Lands Commission satisfies (ii)(b) (*supra*). However, the State Lands Commission is an agency of the State to California to which the United States conveyed the property used to substantiate Manuel's preference right claim. It is, in effect, nothing more than a statement by the owner of land as to his own title and, as such, *it cannot be accepted as the statement required by the regulation. Where the proof of ownership does not comply with the regulation, the Department has held that the preference right is lost even though the proof clearly shows the claimant to have been the owner of adjoining land*, at least prior to the sale. *William H. Boyd, Clarence Virgil West*, A–27440 (June 3, 1957); see *Fred and Mildred M. Bohen et al.*, 63 I.D. 65 (1956). *When Manuel filed a proper certificate of the local recorder of deeds* on May 14, 1956, *the 30-day period had long since elapsed and he had lost his right to assert a preference right to purchase. Id.* [Italics added.]

In *E. E. Larson*, A–27462 (Sept. 17, 1957), the proof of contiguous ownership consisted of a deed on a tax foreclosure, a warranty deed, and a copy of a contract for sale. The claim of preference was rejected because the proof did not conform to the requirements of the regulation, and the subsequent proof was not filed timely. The Department affirmed.

The second point I wish to make is that the contract executed by and between the Chapmans and the appellant cannot possibly be contrued as investing appellant with "ownership of the whole title in fee simple," even were it recorded. The contract provides, in part: "10. *Recording agreement.* This agreement shall not be placed of record but there shall be placed of record an instrument entitled 'Notice of Execution of Agreement' a copy of which is attached hereto as Schedule 'G'."

Turning to Schedule "G" (a copy—not the original), there is no showing it was ever recorded. We do find however, that the instrument declares that the Chapmans and Tuttle have executed an agreement whereby "said J. Burton Suttle [*sic*] *has the right during the term of said agreement to purchase*" (Italics added) the property thereafter described. Returning now to the basic contract instrument, we find that it provides that the Chapmans are to execute a standard statutory warranty deed conveying the property to appellant. This deed, however, is not to be delivered to appellant. Instead it is to be held in escrow by the Rawlins National Bank, and not delivered to appellant until and unless the Chapmans receive the entire purchase price and interest.

In the event of a default, notice must be given and demand made for full payment within a specified time, failing which, in the words of the contract "then the Seller shall be relieved of all liability and obligations *from conveying the property* and shall retain all payments made hereunder as liquidated damages for breach of this agreement *and as rent for the use and occupation of said property* * * *." (Italics added.)

The contract further provides that the Chapmans may then notify the escrow agent and demand redelivery to them of the deed. The agent must then require Tuttle to pay the entire amount within 30 days, failing which "the escrow agent shall redeliver said deed and other escrow documents to the Seller."

From the foregoing it is clear that no conveyance of this land had taken place while the contract was still executory, as it was when appellant asserted his preference right to buy the contiguous Federal land. The instrument itself speaks of the sellers' obligations to convey in future terms. The deed from the Chapmans to Tuttle was withheld from Tuttle precisely because a deed is not effective to convey title until delivery. "An instrument delivered to a third person subject to recall before delivery to the grantee *is not effectual to pass title.*" (Italics added.) 23 Am. Jur. 2d, *Deeds. Delivery to third person* § 96 (1965).

What appellant had at the critical moment is perfectly described by the legal term "inchoate" title, which means "[i]mperfect; partial; unfinished; begun but not completed" *Black's Law Dictionary*, 4th ed. p. 904. Surely, the majority errs when it equates such an interest with ownership of the whole title in fee simple.

By analogy, suppose the preference right claimant were the owner of an unpatented mining claim which was valid in every respect, but the claimant had not yet completed his required $500 worth of improvements. Would the majority consider *him* the owner of the whole title in fee simple? I rather suspect not, although once the improvement work was done he would be entitled to receive fee patent as a matter of law.

The third point I wish to make is that the majority has misconstrued the language of the regulation and, in so doing, frustrated its purpose. Such words as "ownership of the whole title," and "has the whole title in fee," and "owned adjoining land in fee simple" can hardly have been included accidentally or through ignorance. We should recognize that when the drafter of the regulation wrote the requirement that a preference right applicant must show ownership of the whole title in fee simple to the contiguous lands, that is precisely what was intended. Yet the majority presumes to hold that appellant's equity in the contiguous land created by partial payment of the purchase price under the contract, coupled with his possession of the land, constitutes ownership of the whole title in fee simple, notwithstanding the fact that appellant had not paid the full purchase price, no conveyance had been made, and the holders of the legal title (the Chapmans) had the right to refuse to convey if the appellant defaulted. This is errant nonsense.

Clearly, the regulation was written to insure that the person who asserted the preference right would join the subject Federal land to the contiguous lands on which that preference was based. If the preference right applicant acquired the Federal land but lost the adjacent private land to another holder of an outstanding interest, the object and purpose of the preference right would be defeated. Therefore, to insure that the objective would be met, the regulation requires that only those who can prove ownership of the whole title in fee simple are eligible to assert a preference right.

Alaska Placer Co., 33 IBLA 187, 84 I.D. 990 (1977), is a case in point. There the corporate owner of a group of mining claims contracted to sell the claims to a husband and wife on a conditional contract of sale, with a down payment and successive installments. The buyers defaulted, the corporation declared their interest forfeited, refused to convey, and ordered the buyers to vacate. When the buyers refused, the Supreme Court of the State of Alaska held that the buyers were mere trespassers after default and enjoined their continued occupancy. We held in that case that the possession of the putative buyers was in recognition of the title held by the seller, and was in law the occupancy of the seller by those whom the seller put into possession under a conditional contract to deed.

Judge Fishman's citations of various authorities which construe the term "owner" to include an equitable owner are not germane to the issue of what is meant by "ownership of the whole title in fee," which I regard as a much more specific and restrictive qualification. The one case cited by Judge Fishman which defines "whole title in fee" as he does, is *Howard M. Wilson*, 63 I.D. 36 (1956), and that case is distinguishable on its peculiar facts. There the United States had acquired certain land in trust for the use and benefit of the Navajo Tribe of Indians. The Department held that under those circumstances, "For all practical purposes, the Tribe owns all that was conveyed by deed and * * * may be considered to be the owner of contiguous land within the meaning of the public sale law although naked legal title to the land is in the United States." Of course, in that instance it was true, as it was, and is, inconceivable that the United States could or would violate its trust responsibilities and attempt to oust the tribe and acquire the tribe's interest in the land. The tribe in that case was not exposed to the loss of its interest through prescribed conditions and contingencies, as appellant in this case was, nor was there any further conveyance contemplated to complete the transaction, as there was in this case, nor did the tribe owe any further obligation to perform, as did the buyer in this case.

When BLM was first confronted with this situation, it sought and acted upon the advice of the Department's Regional Solicitor. The Regional Solicitor's opinion that Tuttle was not a qualified preference right applicant was based on two previous decisions of this Board, *i.e.*, *Dudley S. Long*, 16 IBLA 18 (1974), and *Robert A. Davidson*, 13 IBLA 368 (1973). Both decisions were authored by Judge Fishman, both involved the assertion of a preference right by one who was purchasing under a contract, and in each case the rejection of the applicant's claim to a preference right was affirmed by this Board. In the *Long* case, *supra*, the Longs were selling the adjacent land to the "Emery Brothers," who attempted to assert a preference right. BLM rejected on the ground that the Longs were the owners of the fee title, whereupon the Emerys attempted to show that they were acting on behalf of the Longs. The Board, applying agency law, held that we could not recognize the right of the Emerys to act for the Longs, nor could we recognize their joint assertion on appeal that together they held the whole title to the adjacent land.

In *Davidson*, *supra*, an en banc decision, the Board faced a fact situation almost identical to the instant case. Davidson, who was purchasing contiguous land from one Chamberlain under a contract to deed, asserted a preference right. He was rejected by BLM because the county clerk and recorder certified that the owner of record was Chamberlain. In affirming BLM's decision, the Board made a number of highly significant declarations, viz:

> In his statement of reasons appellant's attorney states that "appellant Davidson does have the 'title in fee', as he is in just and legal possession of the contiguous property * * *." The attorney further states that under the land sales contract there remained an unpaid balance of $8,600 of a total purchase price of $76,375. He urges that a contract for deed should be accorded the same legal impact as a "deed over-mortgage back" transaction. We proceed to consider first the question whether the documents filed by appellant on October 13, 1972, satisfied regulatory requirements.
>
> * * * Appellant's recital on the form that he holds a "contract for deed from Lawrence A. Chamberlain and Leona A. Chamberlain dated June 8, 1960" does not satisfy the regulations, since it does not fall within any of three categories spelled out in the regulation. *See Jess R. Manuel*, A–27482 (November 29, 1957); *E. E. Larsen*, A–27462 (September 17, 1057); *William H. Boyd*, A–27440 (June 3, 1957).
>
> * * * * *
>
> The preference right provisions of the Public Lands Sale Act and regulations have been strictly construed. *See Charles Kik*, A–27872 (December 1, 1959); *Lawrence V. Lindbloom*, A–27993 (August 4, 1959). *Cf. Albert P. Comer*, A–28150 (April 5, 1960). The rights of a good faith high bidder, as well as those of a con-

tiguous landowner, are involved. [Footnote omitted.]

The *Davidson* decision was well founded when written, was approved en banc by a majority of the Board, and remains the proper rule in such cases. It served as the predicate for BLM's decision in the instant case, and it should not be overruled lightly.

Finally, the majority ignores a point which was of serious concern to the Board in arriving at its holding in *Davidson*, *i.e.*, the right of the high bidder to purchase the land absent the intervention of a qualified claimant to a preference right. By "liberalizing" the interpretation of the regulation so as to equate an inchoate equitable interest with ownership of the whole title in fee simple, the Board will deprive the high bidder of what otherwise would be his/her right to purchase the land in other similar cases.

In summary then (1) the proof submitted by appellant did not meet the requirements of the regulation as it was not based upon an examination of the title record; (2) an inchoate equitable interest based upon a contract which is still executory and where no conveyance has been made to the purchaser and none is intended until some future time does not invest the purchaser with ownership of the whole title in fee simple; (3) the decision of the majority defeats the purpose of the regulation in that there is no firm assurance that the preference right purchaser will become the owner of the contiguous land which serves as the basis for the assertion of the right; and (4) it can defeat the right of a high bidder to purchase the land—a right which would continue to be enjoyed had we adhered to our own good precedent set in the *Davidson* case.

EDWARD W. STUEBING
Administrative Judge

WE CONCUR:

JOSEPH W. GOSS
Administrative Judge

DOUGLAS E. HENRIQUES
Administrative Judge

GREEN COAL CO.

2 IBSMA 199

Decided *August 19, 1980*

Appeal by Green Coal Co. from the Jan. 4, 1980, decision of Administrative Law Judge Tom M. Allen, in Docket No. NX 9-112-R, upholding Notice of Violation No. 79-II-21-8, issued by the Office of Surface Mining Reclamation and Enforcement for an alleged violation of 30 CFR 715.19(e)(1)(vii)(A) (blasting within 1,000 feet of a dwelling without approval of the regulatory authority).

Vacated.

1. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Generally

Pursuant to 43 CFR 4.1161-.1162, it was error for the Administrative Law Judge not to dismiss an application for review

filed with the Hearings Division after the time prescribed for such applications.

APPEARANCES: Joseph H. McKinley, Jr., Esq., McKinley and Howard, Owensboro, Kentucky, for Green Coal Company; John Philip Williams, Esq., Office of the Field Solicitor, Knoxville, Tennessee, and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

Green Coal Co. (Green) appealed from the Jan. 4, 1980, decision of the Hearings Division upholding Notice of Violation No. 79–II–21–8, issued to Green by an inspector of the Office of Surface Mining Reclamation and Enforcement (OSM) who determined that Green had violated 30 CFR 715.19(e)(1)(vii)(A) (by blasting within 1,000 feet of a dwelling without the approval of the regulatory authority) at its Crane Pond mine. We hereby vacate that decision, because there was no authority to consider Green's application for review not timely filed with the Hearings Division, and grant OSM's motion to dismiss Green's application for review.

Factual and Procedural Background

OSM issued Notice of Violation (NOV) No. 79–II–21–8 to Green on May 9, 1979, following an inspection of Green's Crane Pond mine (Permit No. 6475–77), Daviess County, Kentucky, by OSM inspector Gail Kowaleski. The inspector described a violation of 30 CFR 715.19(e)(1)(vii)(A) in the NOV as follows: "Blasting within 1000′ of dwelling without approval of regulatory authority: specifically, blasting approximately 800′ from Charlesetta Simmons dwelling." On May 14, 1979, OSM modified the remedial action ordered in the NOV to make clear that Green was obligated to obtain a waiver from the regulatory authority for blasting within 1,000 feet of the Simmons' dwelling before continuing with such blasting activity.[1]

By a letter dated May 15, 1979, Green supplied OSM's Assessment Office with information pertaining to NOV 79–II–21–8, "[a]s allowed by section 723.16."[2] OSM acknowledged the letter. Subsequently, by a letter dated June 8, 1979, Green requested a conference with Assessment Office personnel to review the civil penalty assessment proposed on the basis of the NOV. OSM's written response to the request, dated Aug. 8, 1979, was that a conference was not necessary because the point value assigned to the violation was less than 30 and, therefore, OSM would not require Green to pay a civil penalty.[3]

---

[1] Because of our holding, it is not necessary for us to describe or evaluate the findings which were the basis for the issuance of the NOV.

[2] 30 CFR 723.16(a) provides:

"Within 10 days of service of a notice or order, the permittee may submit information in writing pertaining to the violation involved to the Assessment Office and to the inspector who issued the notice or order. The Office shall consider any information so submitted in determining the facts surrounding the violation and the amount of the penalty."

Included in Green's letter was the request that the NOV be dismissed.

On Aug. 27, 1979, Green filed with the Hearings Division an application for review of NOV 79-II-21-8. The application consisted of a copy of Green's May 15 letter to the Assessment Office and a covering letter which contained an explanation for the timing of the filing:

> On May 15th, the enclosed letter was mistakenly sent to the Assessment Office, rather than to the Hearings Division. It was my understanding from conversations with the field inspector that the Assessment Office first determined if there was a violation, and set the assessment before any hearings could take place.

On Sept. 17, 1979, OSM moved to have Green's application dismissed. The motion was denied on Jan. 23, 1979, by a ruling that, in response to Green's May 15 letter (particularly the request that the NOV issued to Green be dismissed), "OSM should have either notified the applicant that the Assessment Office was the wrong place to request a dismissal of a notice of violation or else forwarded the correspondence to the Office of Hearings and Appeals," and that "any branch of the U.S. Department of the Interior is now estopped from enforcing the provisions of 43 CFR 4.1161." OSM's request that the ruling be certified to this Board for review, pursuant to 43 CFR 4.1124, also was denied.

A hearing to review the NOV was held on Nov. 29, 1979; a decision upholding OSM's enforcement action was issued on Jan. 4, 1980. Green filed a timely appeal from that decision. Both parties filed briefs.[4]

Discussion

In its brief, OSM argues that the Board should not address the merits of the NOV issued to Green because the company failed to seek timely review thereof before the Hearings Division. OSM suggests that the Board vacate the decision below on the ground that the Administrative Law Judge lacked authority to consider Green's untimely filed application for review, particularly in the face of OSM's objection thereto.[5] For the reasons set forth below, we agree that there was no authority to review the enforcement action against Green. Accordingly, our decision is to vacate the result reached in the proceedings before the Hearings Division, and to reverse the dismissal of OSM's motion against consideration of Green's application for review.

---

[3] Discretionary authority not to assess a civil penalty, when the points assigned on the basis of a notice of violation are less than 30, is implied in 30 CFR 723.12.

[4] On June 3, 1980, the Board ordered supplemental briefing on whether the decision of the Court of Appeals partially invalidating 30 CFR 715.19(e)(1)(vii)(A), *In re Surface Mining Litigation*, Nos. 78-2190, 78-2191, and 78-2192 (D.C. Cir. May 2, 1980), should be accorded retrospective effect in our deliberations (assuming we were to reach the merits of the NOV issued to Green).

[5] OSM's motion to dismiss Green's application was filed prior to any formal action to consider the application within the Hearings Division. The Board accepts that this motion was timely filed, as required by 43 CFR 4.1112.

[1] Secs. 4.1161 through 4.1162 of the procedural regulations provide, in pertinent parts, that "[a] permittee issued a notice or order by the Secretary * * * may file an application for review with the Hearings Division," and that "[a]ny person filing an application for review * * * *shall file* that application within 30 days of the receipt of a notice or order or within 30 days of receipt of notice of modification, vacation, or termination of such a notice or order." [6] (Italics added.) Whether or not, under other circumstances, these regulations might be construed to permit a filing beyond the stated period, there is nothing in the facts now before us that would lead to that conclusion.

Green was apprised of the proper procedures for seeking review of a notice of violation both through the constructive notice afforded by 43 CFR 4.1160–.1171 and by the actual notice afforded by service of Notice of Violation No. 79–II–21–8, which included explicit information concerning the filing of an application for review.[7] Instead of following the procedures set forth in these materials, Green submitted its request for dismissal of the NOV to the Assessment Office. The company did so, it claims, as the result of representations by the inspector who issued the NOV. The actual content of any such representations was not offered into evidence; therefore, we have before us only Green's assertion that they occurred and were misleading. That is not enough to establish responsibility on the part of OSM for the lateness of Green's filing.

The fact that the Assessment Office did not take affirmative action to promote the filing of an application for review by Green with the Hearings Division does not affect our conclusions above. The correspondence of May 15, 1979, which the Administrative Law Judge determined to be a misdirected application for review, was expressly undertaken by Green pursuant to 30 CFR 723.16. Personnel in the Assessment Office, upon reading the letter, could conclude reasonably that it was intended to present information to be considered in proposing a civil penalty assessment—despite the request therein that the NOV be dismissed. We therefore cannot agree with the Administrative Law Judge that this correspondence gave rise to any obligation on the part of OSM to notify Green to file an application for review with the Hearings Division.

---

[6] In the Department's regulations there is no explicit autohrization of or prohibition against consideration of applications for review not timely filed with the Healrngs Division. 43 CFR 4.22(f), a general rule pertaining to practice before the Department, authorizes extensions of time for the filing or serving of a document only in a *pending proceeding* and only when a request for an extension is submitted *within the time* allowed for the filing. Inasmuch as review of a notice of violation is *initiated* by an application for review, extensions of time for the filing of such applications are not governed by this rule (unless by negative implication, which we are not prepared to hold at this time).

[7] On the first page of the NOV are the words "IMPORTANT—PLEASE READ CAREFULLY" followed by the instruction:

"1. Review. You may apply for review of this Notice by submitting an application for review, within 30 days of receipt of this Notice by you or your agent, to: Hearings Division, Office of Hearings and Appeals, U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, Virginia 22202"

For the foregoing reasons, the decision below is vacated,[8] and the motion to dismiss the application for review of Green Coal Company is granted.

MELVIN J. MIRKIN
Administrative Judge

NEWTON FRISHBERG
Administrative Judge

APPEAL OF STATE OF ALASKA

5 ANCAB 4

Decided *August 20, 1980*

Appeal from the Decision of the Bureau of Land Management A-050903, AA-6701-D, 43 FR 14542 (Apr. 6, 1978).

Reversed in part.

1. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Decisions

The Board is bound by statements of policy made by the Secretary of the Interior and contained in a published Departmental Manual Release or in a Secretarial Order published in the *Federal Register*.

2. Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Third-Party Interests

Where lands tentatively approved for conveyance under the Alaska Statehood Act were leased by the State of Alaska pursuant to its open-to-entry lease program prior to enactment of the Alaska Native Claims Settlement Act, such lands must, pursuant to Secretary's Order No. 3029 (43 FR 55287 (1978)), be excluded from conveyance under the Alaska Native Claims Settlement Act because the leases and concurrent purchase options are valid existing rights leading to the acquisition of title.

3. Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Third-Party Interests

The policy expressed in Secretary's Order No. 3029 (43 FR 55287 (1978)), is applicable to all lands still within the Department's jurisdiction, even if the decision to convery such lands pursuant to the Alaska Native Claims Settlement Act was issued by the Bureau of Land Management prior to publication of Order No. 3029.

4. Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Third-Party Interests

Where tentative approval of land selections by the State of Alaska under the Statehood Act was rescinded by the Bureau of Land Management to permit conveyance of the same lands to a Native corporation under the Alaska Native Claims Settlement Act, and subsequently Secretary's Order No. 3029 found that third-party interests leading to fee title, created by the State of Alaska in such lands, were valid existing rights which much be excluded from conveyance to the Native corporation, the Bureau of Land Management must reinstate tentative approval of the State of Alaska's selection of such lands so that the State of Alaska

---

[8] Although we do not reach the merits in this case, we note that, as a result of the decision of the Court of Appeals for the District of Columbia Circuit, n.4, *supra*, the Office of Hearings and Appeals will not recognize Notice of Violation No. 79-II-21-8 as part of a pattern of violations, pursuant to 30 CFR 722.16, or as part of a history of previous violations, pursuant to 30 CFR 723.12.

is able to grant title to such third parties as contemplated by Order No. 3029.

APPEARANCES: James N. Reeves, Esq., and Shelley J. Higgins, Esq., on behalf of the State of Alaska; A. Robert Hahn, Esq., Hahn, Jewell, Stanfill & Frost, on behalf of Seldovia Native Association; James D. Linxwiler, Esq., on behalf of Cook Inlet Region, Inc.; and M. Francis Neville, Esq., Office of the Regional Solicitor, on behalf of the Bureau of Land Management.

OPINION BY ALASKA NATIVE CLAIMS APPEAL BOARD

SUMMARY OF APPEAL

This appeal involves the question of whether open-to-entry leases issued by the State of Alaska prior to enactment of the Alaska Native Claims Settlement Act (ANCSA) on lands tentatively approved to the State of Alaska but subsequently withdrawn by § 11(a)(2) of ANCSA for possible Native selection are protected under ANCSA. The Board finds the question is answered in the affirmative by Secretary's Order No. 3029 (43 FR 55287, Nov. 27, 1978); that the Board is bound by published Secretarial Orders; and that Order No. 3029 is applicable to all lands still within the Department's jurisdiction. The Board concludes that the land underlying the open-to-entry leases here appealed must be excluded from conveyance to the Native corporation, and that the Bureau of Land Management must reinstate tentative approval of the State of Alaska's selection of such land so that the State of Alaska is able to grant title to the lessees as contemplated by Order No. 3029.

JURISDICTION

The Alaska Native Claims Appeal Board, pursuant to delegation of authority to administer the Alaska Native Claims Settlement Act, 85 Stat. 688, *as amended*, 43 U.S.C. §§ 1601–1628 (1976 and Supp. I 1977), and the implementing regulations in 43 CFR Part 2650 and 43 CFR Part 4, Subpart J, hereby makes the following findings, conclusions and Decision reversing in part the above-designated decision of the Bureau of Land Management.

PROCEDURAL BACKGROUND

On Dec. 29, 1959, the State of Alaska (State) filed a selection application for lands near the Native Village of Seldovia. On Oct. 4, 1960, Aug. 5, 1964, and Nov. 15, 1966, the Bureau of Land Management (BLM) issued decisions to tentatively approve conveyance to the State of certain lands within T. 7 S., R. 12 W., Seward meridian. Prior to Dec. 18, 1971, the State issued numerous open-to-entry (OTE) leases for tracts within the tentatively approved lands. On Dec. 18, 1971, § 11 of ANCSA withdrew for Native selection the lands surrounding the Village of Seldovia, including lands in the preceding State selection. On May 16, 1974, Seldovia Native Association, Inc. (Seldovia) filed village selection application AA-6701-D for lands located near the village, including lands within the prior State selections.

In two separate decisions, the BLM on Oct. 6, 1975, vacated the tentative approval previously given for conveyance of the subject lands to the State and on Oct. 9, 1975, approved conveyance of the lands to Seldovia, subject to valid existing rights therein. Seldovia had excluded the State OTE leases from its selection application, but the BLM, in its October 9 decision, identified and considered selected all the OTE leases excluded by Seldovia. The October 9 decision further specified that the lands approved for conveyance to Seldovia were unoccupied and did not include any lawful entry perfected under or being maintained in compliance with laws leading to acquisition of title.

The State appealed the Oct. 6, 1975, decision of the BLM vacating the tentative approval previously given for conveyance of the lands to the State and rejecting the State's selection application as to such lands. The State appeal was consolidated with the *Appeal of Seldovia Native Association, Inc.*, ANCAB VLS 75-15. Seldovia had argued as the basis for its appeal, *inter alia*, that the Oct. 9, 1975, Decision to Issue Conveyance (DIC) proposed the reservation of OTE leases without specifying the extent of the lessees' rights, and that the decision should be amended to specify that the only interest of the OTE lessees which survived ANCSA as a valid existing right is the enjoyment of the present lease term.

In deciding *Appeals of State of Alaska and Seldovia Native Association, Inc.*, 2 ANCAB 1, 84 I.D. 349 (1977) [VLS 75-14/75-15], the Board held that, pursuant to ANCSA, land previously tentatively approved for conveyance to the State was to be conveyed to Native corporations subject to OTE leases issued by the State, but that at the end of the lease term the lessee's rights would end, and the lessee could not enforce the option provided by Alaska statute to receive patent to the land because title to the land would have passed to the Native corporation upon conveyance and the State would never obtain title to convey to the lessee.

In response to, and as a partial reversal of, the position taken by the Board in *Appeals of State of Alaska and Seldovia Native Association, Inc., supra*, the Secretary of the Interior issued Order No. 3016, 85 I.D. 1 (Dec. 14, 1977). Therein, the Secretary determined that State OTE leases issued prior to the effective date of ANCSA on lands tentatively approved to the State, together with the lessee's statutory option to purchase the lands, were valid existing rights protected pursuant to § 14(g) of ANCSA. The Secretary declared that conveyances to Native corporations should be issued subject to such OTE leases, and that the purchase option could subsequently be exercised by the lessee against the grantee Native corporation. Nonetheless, the Secretary declared that the Order was not intended to disturb any administrative determination contained in a final decision previously rendered by any duly authorized Departmental official.

On Apr. 5, 1978, the BLM reissued as a single decision its decisions of Oct. 6 and Oct. 9, 1975. A portion of the lands which had been State selected and tentatively approved were found to have been properly selected under village selection application AA-6701-D. Accordingly, the tentative approval previously given for conveyance of lands to the State was rescinded in part, and the underlying State selection application rejected in part.

In its DIC, the BLM found that the subject lands

> do not include any lawful entry perfected under or being maintained in compliance with Federal laws leading to acquisition of title.
>
> In view of the foregoing, the surface estate of the following described lands * * * is considered proper for acquisition by Seldovia Native Association, Inc., and is hereby approved for conveyance pursuant to section 14(a) of the act [Alaska Native Claims Settlement Act].

Continuing, the BLM provided:

> The grant of lands shall be subject to:
>
> * * * * *
>
> 5. The following third-party interests, if valid, created and identified by the State of Alaska, as provided by section 14(g) of ANCSA, all of which are located in. T. 7 S., R. 12 W., Seward Meridian:
>
> a. Open-to-entry leases
>
> 1. ADL 29454 located in lot 4 of U.S. Survey 3973.
> 2. ADL 41005 located in SE¼ SE¼ of section 1 and NE¼ NE¼ of section 12.
> 3. ADL 41084 located in NW¼ SW¼ of section 29.
> 4. ADL 41085 located in NW¼ SW¼ of section 29.
> 5. ADL 41425 located in NE¼ NE¼ of section 12.
> 6. ADL 41704 located in SW¼ SW¼ of section 30.
> 7. ADL 42954 located in SW¼ SE¼ of section 1.
> 8. ADL 44546 located in SE¼ SE¼ of section 1 and NE¼ NE¼ of section 12.
> 9. ADL 45373 located in NE¼ NE¼ of section 12.
> 10. ADL 47164 located in SW¼ SE¼ of section 1.
> 11. ADL 51665 located in SE¼ SW¼ of section 1.
> 12. ADL 55132 located in SW¼ SW¼ of section 1.
> 13. ADL 55138 located in S½ SW¼ of section 1.
> 14. ADL 55210 located in NE¼ NE¼ of section 12.
>
> * * * * *
>
> Secretarial Order 3016 of December 14, 1977, establishes the policy of the Department of the Interior to valid existing rights under ANCSA. However, the order is not retroactive in that it does not affect the final decision previously rendered by the Alaska Native Claims Appeal Board, VLS 75-14 and 15.

On May 8, 1978, following notice that the Secretary had decided to reconsider Secretary's Order No. 3016, *supra*, the State filed its Notice of Appeal from the above-referenced Apr. 5, 1978 decision of the BLM. The State alleged as the basis for its appeal, *inter alia*, that (1) the lands subject to open-to-entry leases should have been excluded from those lands approved for conveyance to Seldovia pursuant to ANCSA, (2) the land covered by the State OTE lease ADL 41704 was purchased by the lessee prior to the Bureau's decision, so regardless of the Board's disposition of OTE leases generally, the land embraced by ADL 41704 should have been excluded from the lands approved for conveyance, and (3) OTE lease ADL 29454 expired prior to the Bureau's decision without any effort on the part of the lessee to extend, renew, or convert the lease, so the land embraced thereby was on the date of the Bureau's decision available for conveyance without encumbrance to Seldovia.

On Nov. 20, 1978, the Secretary of the Interior issued Order No. 3029, 43 FR 55287 (1978). Order No. 3029, *supra*, reaffirmed the Secretary's position in Order No. 3016, *supra*, that rights created pursuant to the State's OTE lease program are valid existing rights within the meaning of ANCSA. Revising his earlier position, though, that conveyances of land under ANCSA should be issued subject to previously-issued OTE leases, the Secretary declared that land covered by such leases should be excluded from conveyances to Native corporations. Also, the Secretary referred to the Solicitor the question of whether the Order should be applied retroactively to decisions of this Board and of the BLM issued prior to publication of Order No. 3029, *supra*. On Jan. 31, 1979, pending the issuance of a ruling on the question of retroactivity, the Board suspended further proceedings in this appeal.

On Jan. 18, 1980, pursuant to a Stipulation for Partial Dismissal, the Board ordered this appeal dismissed insofar as it involved interests claimed pursuant to OTE lease ADL 29454, because that lease had expired and was not extant on the date of the DIC from which this appeal was taken. Such dismissal accords with Order No. 3029, *supra*, wherein the Secretary declared, "If the lessee fails to exercise the option to purchase, the affected Native corporation can * * * have the land conveyed as part of its original entitlement."

The issue of retroactivity was decided Mar. 27, 1980. By publication of Departmental Manual Release Number 2246, 601 DM 2, the Secretary decided that the policy set forth in Order No. 3029, *supra*, would be applied retroactively. The Secretary also expressly reversed the decision of this Board in *Appeals of State of Alaska and Seldovia Native Association Inc.*, *supra*. The Secretary adopted the memorandum of the Solicitor dated June 2, 1979 (attached as Appendix 3 to 601 DM 2) as the position of the Department and decided that the policy stated in Order No. 3029, *supra*, would apply to all land still within the Department's jurisdiction.

The Board, on May 9, 1980, ordered the record of the appeal closed as of June 9, 1980, but allowed the filing of additional briefng prior to closing of the record. Seldovia and the State each filed an additional brief pursuant to the Board's order.

DECISION

[1] The Board has previously eld that it is bound by statements f Secretarial policy contained in Secretarial Order published in the *'ederal Register. Appeal of Ouinkie Native Corp.*, 4 ANCAB 3, 6 I.D. 618 (1979) [VLS 78–7]. The oard is also bound by statements f policy made by the Secretary and ontained in a published Departiental Manual Release.

[2] Thus, the Board is bound by ie Secretarial policy expressed in rder No. 3029, *supra*, and in Deartmental Manual Release Numer 2246, *supra*, which policy is disositive of this appeal. Specifically, here lands tentatively approved r conveyance under the Alaska tatehood Act, 72 Stat. 339, 48 .S.C. Prec. § 21 (1958), were ased by the State pursuant to its TE lease program prior to enactent of ANCSA, such lands must, irsuant to Order No. 3029, *supra*, excluded from conveyance under NCSA because the leases and conrrent purchase options are valid isting rights leading to the acisition of title. Further, the OTE ssees are not precluded by the NCSA conveyance from receiving tent for the leased land from the ate.

[3] This policy is applicable to all lands still within the Department's jurisdiction, even if the decision to convey such lands under ANCSA was issued prior to publication of Order No. 3029, *supra*.

[4] Tentative approval of land selections by the State under the Statehood Act, *supra*, was rescinded by BLM to permit conveyance of the same lands to Seldovia under the Alaska Native Claims Settlement Act. Subsequently, Order No. 3029, *supra*, found that third-party interests leading to fee title, created by the State in such lands, were valid existing rights which must be excluded from conveyance to the Native corporation. Accordingly, BLM must reinstate tentative approval of the State's selection of such lands so that the State is able to grant title to such third parties as contemplated by Order No. 3029, *supra*.

The State argued that regardless of the Board's disposition of OTE leases generally, the land embraced by OTE lease ADL 41704 should have been excluded from the lands approved for conveyance, because prior to the date of the DIC the State had patented the leased land to the lessee. The State's argument is not persuasive.

The State failed to state whether the patent had been issued prior to the effective date of ANCSA. A patent issued after the effective date of ANCSA does not, in and of itself, establish valid existing rights protected under ANCSA. Creation of new third-party interests by the issuance of State patent after ANCSA would violate § 11(a)(2) of ANCSA, and any such interest created after ANCSA would not be protected under ANCSA.

Nevertheless, the land embraced by OTE lease ADL 41704 and subsequently patented by the State is to be protected under ANCSA. Because the lease and concurrent purchase option comprise an interest leading to acquisition of title, pursuant to Order No. 3029, *supra*, the land is to be excluded from conveyance under ANCSA.

ORDER

It is therefore Ordered that the decision of the Bureau of Land Management here appealed is reversed to the following limited extent:

(a) The BLM's rejection of State of Alaska selection application A-050903 is reversed insofar as the rejection applies to lands covered by OTE leases ADL 41005, ADL 41084, ADL 41085, ADL 41425, ADL 41704, ADL 42954, ADL 44546, ADL 45373, ADL 47164, ADL 51665, ADL 55132, ADL 55138, and ADL 55210 issued by the State of Alaska.

(b) Lands covered by OTE leases ADL 41005, ADL 41084, ADL 41085, ADL 41425, ADL 41704, ADL 42954, ADL 44546, ADL 45373, ADL 47164, ADL 51665, ADL 55132, ADL 55138, and ALD 55210 shall be excluded from those lands to be conveyed to Seldovia Native Association, Inc.

All pending motions of the parties before the Board in this appeal not specifically addressed herein are defined.

The Bureau of Land Management is hereby directed to take action consistent with this decision.

This represents a unanimous decision of the Board.

Judith M. Brady
Administrative Judge

Abigail F. Dunning
Administrative Judge

Joseph A. Baldwin
Administrative Judge

APPEAL OF DANIEL B. WINN

5 ANCAB 19

Decided *August 25, 1980*

Appeal from the Decision of the Bureau of Land Management A-050903, AA-6701-D, 43 FR 14542 (Apr. 6, 1978).

Reversed in part.

1. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Decisions

The Board is bound by statements of policy made by the Secretary of the Interior and contained in a published Departmental Manual Release or in a Secretarial Order published in the *Federal Register*.

2. Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Third-Party Interests

Where lands tentatively approved for conveyance under the Alaska Statehood

Act were leased by the State of Alaska pursuant to its open-to-entry lease program prior to enactment of the Alaska Native Claims Settlement Act, such lands must, pursuant to Secretary's Order No. 3029 (43 FR 55287 (1978)), be excluded from conveyance under the Alaska Native Claims Settlement Act because the leases and concurrent purchase options are valid existing rights leading to the acquisition of title.

3. Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Third-Party Interests

The policy expressed in Secretary's Order No. 3029 (43 FR 55287 (1978)) is applicable to all lands still within the Department's jurisdiction, even if the decision to convey such lands pursuant to the Alaska Native Claims Settlement Act was issued by the Bureau of Land Management prior to publication of Order No. 3029.

4. Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Third-Party Interests

Where tentative approval of land selections by the State of Alaska under the Statehood Act was rescinded by the Bureau of Land Management to permit conveyance of the same lands to a Native corporation under the Alaska Native Claims Settlement Act, and subsequently Secretary's Order No. 3029 (43 FR 55287 (1978)) found that third-party interests leading to fee title, created by the State of Alaska in such lands, were valid existing rights which must be excluded from conveyance to the Native corporation, the Bureau of Land Management must reinstate tentative approval of the State of Alaska's selection of such lands so that the State of Alaska is able to grant title to such third parties as contemplated by Order No. 3029.

APPEARANCES: Daniel B. Winn, *pro se*; M. Francis Neville, Esq., Office of the Regional Solicitor, on behalf of the Bureau of Land Management; Shelley J. Higgins, Esq., Assistant Attorney General, on behalf of the State of Alaska; A. Robert Hahn, Esq., Hahn, Jewell & Stanfill, on behalf of Seldovia Native Association, Inc.

OPINION BY ALASKA NATIVE CLAIMS APPEAL BOARD

SUMMARY OF APPEAL

This appeal involves the question of whether an open-to-entry lease issued by the State of Alaska prior to enactment of the Alaska Native Claims Settlement Act (ANCSA) on lands tentatively approved to the State of Alaska but subsequently withdrawn by § 11(a)(2) of ANCSA for possible Native selection is protected under ANCSA. The Board finds the question is answered in the affirmative by Secretary's Order No. 3029 (43 FR 55287, Nov. 27, 1978); that the Board is bound by published Secretarial Orders; and that Order No. 3029 is applicable to all lands still within the Department's jurisdiction. The Board concludes that the land underlying the open-to-entry lease here appealed must be excluded from conveyance to the Native corporation, and that the Bureau of Land Management must reinstate tentative approval of the State of Alaska's selection of such land so that the State of Alaska is able to grant title to the lessees as contemplated by Order No. 3029.

JURISDICTION

The Alaska Native Claims Appeal Board, pursuant to delegation of authority to administer the Alaska Native Claims Settlement Act, 85 Stat. 688, *as amended*, 43 U.S.C. §§ 1601–1628 (1976 and Supp. I 1977), and the implementing regulations in 43 CFR Part 2650 and 43 CFR Part 4, Subpart J, hereby makes the following findings, conclusions and Decision reversing in part the above-designated decision of the Bureau of Land Management.

PROCEDURAL BACKGROUND

On Dec. 29, 1959, the State of Alaska (State) filed a selection application for lands near the Native Village of Seldovia. On Oct. 4, 1960, Aug. 5, 1964, and Nov. 15, 1966, the Bureau of Land Management (BLM) issued decisions to tentatively approve conveyance to the State of certain lands within T. 7 S., R. 12 W., Seward meridian. Prior to Dec. 18, 1971, the State issued numerous open-to-entry (OTE) leases for tracts within the tentatively approved lands. On Dec. 18, 1971, § 11 of ANCSA withdrew for Native selection the lands surrounding the Village of Seldovia, including lands in the preceding State selection. On May 16, 1974, Seldovia Native Association, Inc. (Seldovia) filed village selection application AA–6701–D for lands located near the village, including lands within the prior State selections.

In two separate decisions, the BLM on Oct. 6, 1975, vacated the tentative approval previously given for conveyance of the subject lands to the State and on Oct. 9, 1975, approved conveyance of the lands to Seldovia, subject to valid existing rights therein. Seldovia had excluded the State OTE leases from its selection application, but the BLM, in its October 9 decision, identified and considered selected all the OTE leases excluded by Seldovia. The October 9 decision further specified that the lands approved for conveyance to Seldovia were unoccupied and did not include any lawful entry perfected under or being maintained in compliance with laws leading to acquisition of title.

The State appealed the Oct. 6, 1975 decision of the BLM vacating the tentative approval previously given for conveyance of the lands to the State and rejecting the State's selection application as to such lands. The State appeal was consolidated with the *Appeal of Seldovia Native Association, Inc.*, ANCAB VLS 75–15. Seldovia had argued as the basis for its appeal, *inter alia*, that the Oct. 9, 1975, Decision to Issue Conveyance (DIC) proposed the reservation of OTE leases without specifying the extent of the lessees' rights, and that the decision should be amended to specify that the only interest of the OTE lessees which survived ANCSA as a valid existing right is the enjoyment of the present lease term.

In deciding *Appeals of State of Alaska and Seldovia Native Associ-*

ation, Inc., 2 ANCAB 1, 84 I.D. 349 (1977) [VLS 75-14/75-15], the Board held that, pursuant to ANCSA, land previously tentatively approved for conveyance to the State was to be conveyed to Native corporations subject to OTE leases issued by the State, but that at the end of the lease term the lessee's rights would end, and the lessee could not enforce the option provided by Alaska statute to receive patent to the land because title to the land would have passed to the Native corporation upon conveyance and the State would never obtain title to convey to the lessee.

In response to, and as a partial reversal of, the position taken by the Board in *Appeals of State of Alaska and Seldovia Native Association, Inc., supra*, the Secretary of the Interior issued Order No. 3016, 85 I.D. 1 (Dec. 14, 1977). Therein, the Secretary determined that State OTE leases issued prior to the effective date of ANCSA on lands tentatively approved to the State, together with the lessee's statutory option to purchase the lands, were valid existing rights protected pursuant to § 14(g) of ANCSA. The Secretary declared that conveyances to Native corporations should be issued subject to such OTE leases, and that the purchase option could subsequently be exercised by the lessee against the grantee Native corporation. Nonetheless, the Secretary declared that the Order was not intended to disturb any administrative determination contained in a final decision previously rendered by any duly authorized Departmental official.

On Apr. 5, 1978, the BLM reissued as a single decision its decisions of Oct. 6 and Oct. 9, 1975. A portion of the lands which had been State selected and tentatively approved were found to have been properly selected under village selection application AA-6701-D. Accordingly, the tentative approval previously given for conveyance of lands to the State was rescinded in part, and the underlying State selection application rejected in part.

In its DIC, the BLM found that the subject lands

> do not include any lawful entry perfected under or being maintained in compliance with Federal laws leading to acquisition of title.
>
> In view of the foregoing, the surface estate of the following described lands * * * is considered proper for acquisition by Seldovia Native Association, Inc., and is hereby approved for conveyance pursuant to section 14(a) of the act [Alaska Native Claims Settlement Act].

Continuing, the BLM provided:

> The grant of lands shall be subject to:
>
> * * * * *
>
> 5. The following third-party interests, if valid, created and identified by the State of Alaska, as provided by section 14(g) of ANCSA, all of which are located in T. 7 S., R. 12 W., Seward Meridian:
>
> a. Open-to-entry leases
>
> * * * * *
>
> 12. ADL 55132 located in SW¼ SW¼ of section 1.
>
> * * * * *
>
> Secretarial Order 3016 of December 14, 1977, establishes the policy of the Department of the Interior to valid existing rights under ANCSA. However, the order

is not retroactive in that it does not affect the final decision previously rendered by the Alaska Native Claims Appeal Board, VLS 75-14 and 15.

On Apr. 28, 1978, Daniel B. Winn, lessee under OTE lease number ADL 55132, filed his Notice of Appeal from the above-referenced decision of the BLM. On Aug. 31, 1978, the Board suspended further action and briefing in this appeal pending reconsideration of Secretary's Order No. 3016, *supra*.

On Nov. 20, 1978, the Secretary of the Interior issued Order No. 3029, 43 FR 55287 (1978). Order No. 3029, *supra*, reaffirmed the Secretary's position in Order No. 3016, *supra*, that rights created pursuant to the State's OTE lease program are valid existing rights within the meaning of ANCSA. Revising his earlier position, though, that conveyances of land under ANCSA should be issued subject to previously-issued OTE leases, the Secretary declared that land covered by such leases should be excluded from conveyances to Native corporations. Also, the Secretary referred to the Solicitor the question of whether the Order should be applied retroactively to decisions of this Board and of the BLM issued prior to publication of Order No. 3029, *supra*.

The issue of retroactivity was decided Mar. 27, 1980. By publication of Departmental Manual Release Number 2246, 601 DM 2, the Secretary decided that the policy set forth in Order No. 3029, *supra*, would be applied retroactively. The Secretary also expressly reversed the decision of this Board in *Appeals of State of Alaska and Seldovia Native Association Inc.*, *supra*. The Secretary adopted the memorandum of the Solicitor dated June 2, 1979 (attached as Appendix 3 to 601 DM 2) as the position of the Department and decided that the policy stated in Order No. 3029, *supra*, would apply to all land still within the Department's jurisdiction.

The Board, on May 9, 1980, ordered the record of the appeal closed as of June 9, 1980, but allowed the filing of additional briefing prior to closing of the record. Seldovia and the State each filed an additional brief pursuant to the Board's order.

DECISION

[1] The Board has previously held that it is bound by statements of Secretarial policy contained in a Secretarial Order published in the *Federal Register*. *Appeal of Ouzinkie Native Corp.*, 4 ANCAB 3, 86 I.D. 618 (1979) [VLS 78-7]. The Board is also bound by statements of policy made by the Secretary and contained in a published Departmental Manual Release.

[2] Thus, the Board is bound by the Secretarial policy expressed in Order No. 3029, *supra*, and in Departmental Manual Release Number 2246, *supra*, which policy is dispositive of this appeal. Specifically, where lands tentatively approved for conveyance under the Alaska Statehood Act, 72 Stat. 339, 48 U.S.C. Prec. § 21 (1958), were

leased by the State pursuant to its OTE lease program prior to enactment of ANCSA, such lands must, pursuant to Order No. 3029, *supra*, be excluded from conveyance under ANCSA because the leases and concurrent purchase options are valid existing rights leading to the acquisition of title. Further, the OTE lessees are not precluded by the ANCSA conveyance from receiving patent for the leased land from the State.

[3] This policy is applicable to all lands still within the Department's jurisdiction, even if the decision to convey such lands under ANCSA was issued prior to publication of Order No. 3029, *supra*.

[4] Tentative approval of land selections by the State under the Statehood Act, *supra*, was rescinded by BLM to permit conveyance of the same lands to Seldovia under the Alaska Native Claims Settlement Act. Subsequently, Order No. 3029, *supra*, found that third-party interests leading to fee title, created by the State in such lands, were valid existing rights which must be excluded from conveyance to the Native corporation. Accordingly, BLM must reinstate tentative approval of the State's selection of such lands so that the State is able to grant title to such third parties as contemplated by Order No. 3029, *supra*.

ORDER

It is therefore Ordered that the decision of the Bureau of Land Management here appealed is reversed to the following limited extent:

(a) The BLM's rejection of State of Alaska selection application A-050903 is reversed insofar as the rejection applies to lands covered by OTE lease ADL 55132 issued by the State of Alaska.

(b) Lands covered by OTE lease ADL 55132, shall be excluded from those lands to be conveyed to Seldovia Native Association, Inc.

All pending motions of the parties before the Board in this appeal not specifically addressed herein are denied.

The Bureau of Land Management is hereby directed to take action consistent with this decision.

This represents a unanimous decision of the Board.

Judith M. Brady
Administrative Judge

Abigail F. Dunning
Administrative Judge

Joseph A. Baldwin
Administrative Judge

BRANHAM AND BAKER COAL CO., INC.

2 IBSMA 209

Decided *August 28, 1980*

Appeal by the Office of Surface Mining Reclamation and Enforcement from a Jan. 7, 1980, decision by Administrative Law Judge Tom M. Allen vacating Notice of Violation No. 79-2-55-21 (Docket No. NX 9-124-R).

best copy available

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Inspections: Generally

The regulation, 30 CFR 715.11(b), requiring that authorizations to operate be available for inspection at or near the minesite obligates the permittee or mine operator to maintain those authorizations where they are readily available for review by an inspector during an on-site inspection. However, if the authorizations are not immediately available and the inspector wants to review them, he or she must specifically direct that they be produced within a reasonable time.

APPEARANCES: D. B. Kazee, Esq., Francis, Kazee and Francis, Prestonburg, Kentucky, for Branham and Baker Coal Co., Inc.; Charles P. Gault, Esq., Office of the Field Solicitor, Knoxville, Tennessee, Walton D. Morris, Jr., Esq., and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Division of Surface Mining, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

Procedural Background

On Aug. 28, 1979, pursuant to the Surface Mining Control and Reclamation Act of 1977,[1] two Office of Surface Mining Reclamation and Enforcement (OSM) inspectors inspected the Nos. 12 and 13 mines of Branham and Baker Coal Co., Inc. (Branham), located in Magoffin County, Kentucky, and issued Notice of Violation No. 79-2-55-21 charging Branham with a violation of 30 CFR 715.11(b), "[f]ailure to have authorizations to operate at or near the minesite."

Branham filed an application for review of the notice. Following a hearing held on Nov. 16, 1979, Administrative Law Judge Allen issued a written decision on Jan. 7, 1980, vacating the notice of violation. OSM filed a timely notice of appeal and both parties have filed briefs.

Factual Background

When the OSM inspectors arrived at Branham's mine on Aug. 28, 1979, they met the pit foreman, identified themselves, informed him they were there to make an inspection, and requested the mine authorizations. The pit foreman did not have them, but he called the mine superintendent on the truck radio and informed the inspectors that the superintendent was "on the other job" and would be "over there a little bit later" (Tr. 8). The inspectors started their inspection and the superintendent arrived 20 or 30 minutes later. OSM inspector Gary Francis told the superintendent that they needed the authorizations. The superintendent looked in his truck, but found only the mine map. Inspector Francis believed that the superintendent thought the authorizations were in the truck (Tr. 8). The superintendent told the inspectors that the authorizations were in Branham's office in Prestonburg (Tr. 10). The inspector did not ask the superintendent to get the authorizations, nor did the superintendent offer to get them (Tr. 10). The inspectors had just about completed their inspection. They were ready to leave about 20 minutes after the superintendent arrived (Tr. 9).

---

[1] Act of Aug. 3, 1977, 91 Stat. 445, 30 U.S.C. §§ 1201-1328 (Supp. I 1977).

It was approximately 16 miles from Branham's office in Prestonburg to the minesite (Tr. 21–23). There is radio communication between the site and the office (Tr. 23). If a call had been made, the permit package could have been delivered to the minesite in approximately 20 minutes (Tr. 23).

Discussion

The regulation that Branham was charged with violating, 30 CFR 715.11(b), states: "*Authorizations to operate.* A copy of all current permits, licenses, approved plans, or other authorizations to operate the mine *shall be available for inspection at or near the mine site.*" (Italics added). The preamble to the interim regulations contains the following language in response to comments concerning 30 CFR 715.11(b): "In order to ensure effective and efficient enforcement it is necessary for permits and related documents to be readily available to State and Federal officials in the course of their on-site inspections. However, the phrase 'at or near the mine site' is intended to include offices in nearby towns." [2]

OSM argues that 30 CFR 715.11 (b) requires the mine operator to make the authorizations available to the inspector during the course of the on-site inspection. OSM indicates that its policy concerning violations of 30 CFR 715.11(b) is to have inspectors request to see copies of authorizations at the beginning of their inspections, and a violation is written only if the documents are not furnished to the inspector during the inspection. If the documents are at a nearby location and are brought to the minesite during the inspection, a violation is not written.

OSM agrees that Branham's system was workable and that maintaining the records in Prestonburg did not violate the regulation (OSM Brief at 6). OSM also states that a violation would not have been written if Branham's employee had called Prestonburg and had the authorizations delivered. Therefore, OSM's contention is that the critical factor in this case is that Branham's employee failed to call the Prestonburg office.

[1] The regulation obligates the permittee or mine operator to maintain the authorizations where they are readily available to an inspector during the course of an on-site inspection. However, if the authorizations are not immediately available and the inspector wants to review them, he or she must specifically di-

---

[2] 42 FR 62642 (Dec. 13, 1977).

rect that they be produced within a reasonable time.

In this case there is no question that the authorizations were readily available in Branham's Prestonburg office. What was lacking was a specific direction by the inspector to produce them. The inspector testified that he did not instruct the superintendent to get the authorizations after the superintendent realized he did not have them with him. There is no evidence that the inspector explained the consequences of failing to produce the documents. Given the fact that the inspection was nearly complete, it would be reasonable for the superintendent to have concluded that the inspector no longer wanted the authorizations.

Therefore, while we agree with OSM that the responsibility for producing the authorizations is on the permittee or mine operator, an inspector must ask that they be produced within a reasonable time. Failure to produce them following a specific direction would constitute a violation of the regulation. There was no violation of 30 CFR 715.11(b) under the facts of this case.

The decision appealed from is affirmed.

Will A. Irwin
Chief Administrative Judge

Newton Frishberg
Administrative Judge

Melvin J. Mirkin
Administrative Judge

BETHLEHEM MINES CORP.

2 IBSMA 215

Decided *August 29, 1980*

Notice of appeal filed by Bethlehem Mines Corp., from an Apr. 3, 1980, decision of Administrative Law Judge Sheldon L. Shepherd in Docket No. CH 0–149–R, sustaining Notice of Violation No. 80–I–54–3 issued for failure to pass all surface drainage through a sedimentation pond at a rail loading facility in violation of 30 CFR 715.17(a) and 717.17(a).

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Tipples and Processing Plants: In Connection with—Surface Mining Control and Reclamation Act of 1977: Words and Phrases

"Surface coal mining operations." A coal loading facility controlled by the same company that owns the mine supplying coal to it may conduct activities "in connection with" a surface coal mine within the meaning of "surface coal mining operations" in 30 CFR 700.5.

2. Surface Mining Control and Reclamation Act of 1977: Tipples and Processing Plants: At or Near a Minesite—Surface Mining Control and Reclamation Act of 1977: Words and Phrases

"Surface coal mining operations." A coal loading facility functionally and economically integrated with a commonly controlled coal mine located 2 miles away may be "near" a minesite within the meaning of "surface coal mining operations" in 30 CFR 700.5.

3. Surface Mining Control and Reclamation Act of 1977: Words and Phrases

"Permit area." During the initial regulatory program, when a facility otherwise included within the meaning of "surface coal mining operations" is not specifically covered by a permit, the "permit area" is at least coextensive with the disturbed area.

APPEARANCES: Henry Ingram, Esq., and R. Henry Moore, Esq., Rose, Schmidt, Dixon, Hasley, Whyte & Hardesty, Pittsburgh, Pennsylvania, for Bethlehem Mines Corp.; William F. Larkin, Esq., Office of the Field Solicitor, Charleston, West Virginia, Mark Squillace, Esq., and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

Bethlehem Mines Corp. (Bethlehem) has sought review of a decision of the Hearings Division sustaining a notice of violation issued by the Office of Surface Mining Reclamation and Enforcement (OSM) for alleged noncompliance with the sedimentation pond requirements of the Surface Mining Control and Reclamation Act of 1977[1] and 30 CFR 715.17(a) and 717.17(a). For the reasons discussed below, we affirm that decision.

Background

On Jan. 16, 1980, an OSM inspector visited a rail loading facility in Butler County, Pennsylvania. The sign at the entrance to the facility identified it as "Mine 91 Rail Loading Facility, Bethlehem Mines Corporation" and listed Bethlehem Mine's Mine Safety and Health Administration (MSHA) number (Exh. H; Tr. 23-24). The facility covered approximately 2.4 acres and consisted of coal stockpiles, a conveyor, a high-lift, and other equipment needed to load coal onto railroad cars (Tr. 80, 92).

The foreman at the tipple started to accompany the inspector and then decided he should contact Bethlehem's main office at Mine 91, located 2 miles away. He left the inspector, contacted Bethlehem, and then returned to the inspector (Tr. 9–10, 78). When the inspector found no sedimentation control structures at the tipple and evidence that coal and coal fines had left the disturbed area, the foreman requested that the resulting notice of violation, numbered 80–I–54–3, be served on Bethlehem officials at Mine 91 (Tr. 10–12). The inspector did this, and then returned to the tipple with those officials at their request to discuss abatement (Tr. 12, 15, 16).

The land on which the tipple is located is owned by the Bessemer & Lake Erie Railroad and leased by Bethelehem Mines Corp. (Tr. 75, 92). The facility is operated by Wayne W. Sell Corp., an independent trucking operation, under contract with Bethlehem Steel Corp. (Tr. 57–58, 73–74). That contract describes the services provided by Sell as: "Operating Bethlehem Mines Corporation tipple in Clinton Township, Butler County, and loading of rail cars on the Bessemer & Lake Erie Railroad Company siding at that location." Coal was to be loaded in such quantities "as required" and at such times "as required" by the superintendent of Bethlehem Mines (Exh. 1).

---

[1] Act of Aug. 3, 1977, 91 Stat. 445, 30 U.S.C. §§ 1201–1328 (Supp. I, 1977).

In 1979 approximately 95 percent of the coal loaded through the facility came from Bethlehem Mine 91 (Tr. 63), while 100 percent of the coal loaded in 1980 came from that mine (Tr. 15, 63). When Mine 91 was placed on an indefinite standby status on Feb. 28, 1980, the tipple was also closed (Tr. 59, 73).

The decision below found that the tipple was subject to OSM regulation and sustained the notice of violation. Bethlehem appealed this decision and both parties filed briefs. Pursuant to a request made by Bethlehem, an oral argument was held on Aug. 7, 1980.

Discussion and Conclusions

In *Drummond Coal Co.*, 2 IBSMA 96, 87 I.D. 196 (1980), the Board stated a two-part test for determining whether a coal processing or loading facility is a surface coal mining operation within the meaning of 30 CFR 700.5. That test involves whether the facility is operated "in connection with" a mine and is "at or near the minesite." We find that both of these tests are met in this case.

[1] The loading facility is operated in connection with the Bethlehem Mine 91. Although the connection is evidenced by many of the facts adduced at the hearing, the Board considers the following facts especially significant. The facility was under Bethlehem's control by virtue of the lease of the property from the railroad. The tipple was identified as being the rail loading facility for Bethlehem's Mine 91 through the sign at its entrance. The contract between Bethlehem and Sell indicated that Bethlehem considered that Sell was providing services at a Bethlehem facility. The foreman at the tipple paid clear deference to Bethlehem. When Mine 91 stopped production, the tipple was closed and employees there were laid off. Although the facility was neither owned nor operated by Bethlehem, as was the case in both *Drummond*, *supra*, and *Drummond Coal Co.*, 2 IBSMA 189, 87 I.D. 347 (1980), Bethlehem controlled the facility through its lease from the railroad and contract with Sell. *See Virginia Iron, Coal & Coke Co.*, 2 IBSMA 165, 171, 87 I.D. 327, 330 (1980). Such control, combined with Bethlehem's use of the tipple to load coal from Mine 91 and public advertising of a relationship between the mine and tipple through the sign bearing its MSHA number at the entrance is sufficient to establish that the facility is operated in connection with that mine within the meaning of 30 CFR 700.5.

[2] The facility is also located "at or near the minesite." It is only 2 miles away from the mine. The economic and functional integration and common control of the tipple and the mine are sufficient to bring the facility within the meaning of "near" in 30 CFR 700.5.

The findings that the tipple is operated in connection with Mine 91 and is near that mine make the facility a surface coal mining operation subject to OSM regulation. The decision below that the rail loading facility is subject to regulation by OSM is proper.

[3] Bethlehem also argued that because Pennsylvania does not issue permits for loading facilities, there is no "permit area." 30 CFR 715.17(a) and 717.17(a) require that surface drainage from the disturbed area be passed through a sedimentation pond before leaving the permit area. The notice issued to Bethlehem stated that discharges were not passing through a pond before leaving the "disturbed area." During the initial regulatory program, when a facility otherwise included within the meaning of "surface coal mining operations" is not specifically covered by a permit, the "permit area" is at least coextensive with the disturbed area.

Bethlehem raised other arguments going to the validity of the notice of violation that were addressed in the decision below. We see no reason to disturb the conclusions that each of these arguments was without merit.

Therefore, the Apr. 3, 1980, decision of the Hearings Division is affirmed.

Melvin J. Mirkin
Administrative Judge

Will A. Irwin
Chief Administrative Judge

Newton Frishberg
Administrative Judge

SUNBEAM COAL CORP.

2 IBSMA 222

Decided *August 29, 1980*

Notice of appeal filed by Sunbeam Coal Corp., from a Feb. 4, 1980, decision of Administrative Law Judge Sheldon L. Shepherd in Docket No. CH 9–108–R sustaining violation No. 3 of Notice of Violation No. 79–I–18–11 issued for diverting the flow of an intermittent stream without regulatory authority approval in violation of 30 CFR 715.17(d)(1).

Reversed.

1. Surface Mining Control and Reclamation Act of 1977: Evidence: Generally

The existence of an intermittent stream at the time of an OSM inspection and at subsequent inspections and the statements of mine officials that an intermittent stream existed before the initial inspection raise a rebuttable presumption that an intermittent stream subject to the requirements of 30 CFR 715.17(d) existed prior to mining.

2. Surface Mining Control and Reclamation Act of 1977: Evidence: Generally

Persuasive, uncontradicted evidence that the state regulatory authority considered a stream to be ephemeral before the granting of a permit, coupled with other evidence to the same effect, is sufficient under the circumstances to rebut the presumption that an intermittent stream existed prior to mining.

APPEARANCES: Leo M. Stepanian, Esq., Brydon, Stepanian & Muscatello, Butler, Pennsylvania, for Sunbeam

Coal Corp.; Billy Jack Gregg, Esq., Office of the Field Solicitor, Charleston, West Virginia, Mark Squillace, Esq., and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

Sunbeam Coal Corp., (Sunbeam) has sought review of a decision issued on Feb. 4, 1980, by Administrative Law Judge Sheldon L. Shepherd sustaining Violation No. 3 of Notice of Violation No. 79–I–18–11.[1] The notice was issued pursuant to the Surface Mining Control and Reclamation Act of 1977 (Act)[2] and alleged that Sunbeam had diverted the flow of an intermittent stream on the permit area without regulatory authority approval in violation of 30 CFR 715.17(d)(1). For the reasons discussed below, we reverse that decision.

Background

On May 16–17, 1979, the Office of Surface Mining Reclamation and Enforcement (OSM) inspected Sunbeam's McGarvey surface mining operation in Butler County, Pennsylvania. Mining had been completed on permit No. 179–37 (Tr. 67), but was continuing on permit No. 179–37A, a neighboring area. In inspecting the reclamation operations on permit No. 179–37, OSM discovered a stream flowing through the reclaimed area. Based upon his observations of the stream channel and the statements of the site superintendent, the inspector concluded that the stream flowed more than 30 consecutive days during the year and was, therefore, an intermittent stream under 30 CFR 710.5 (Tr. 68–69, 87, 93).[3] Because Sunbeam did not have permission from the regulatory authority to divert an intermittent stream, the inspector issued violation No. 3 of Notice of Violation No. 79–I–18–11 for a violation of 30 CFR 715.17(d)(1).[4] On four subsequent visits covering more than a month, the inspector found the stream always flowing in substantially the same manner (Tr. 75–86, 115).

The evidence at the hearing showed that Pennsylvania determines whether a stream is an intermittent stream by referring to Geological Survey topographical maps (Tr. 71). These maps, however, do not indicate an intermittent stream that is less than 2,000 feet long or within 1,000 feet of a change of watershed (Tr. 73). The State was familiar with the area, which was a wooded hollow before mining, both because of work it was doing to seal some adjacent abandoned mine workings and from inspections of the permit area before granting the permit (Tr. 97-98, 110-111, 147). The permit as issued did not mention an intermittent stream (Tr. 70, 91, 94, 122).

---

[1] Notice of Violation No. 79–I–18–11 originally contained four violations: Review of violation No. 1 was withdrawn with prejudice at the hearing by Sunbeam; violation No. 4 was vacated by OSM at the hearing; violation No. 2 was decided against Sunbeam by the Administrative Law Judge, but was not appealed.

[2] Act of Aug. 3, 1977, 91 Stat. 445, 30 U.S.C. §§ 1201–1328 (Supp. I 1977).

[3] 30 CFR 710.5 reads:

"*Intermittent or perennial stream* means a stream or part of a stream that flows continuously during all (perennial) or for at least one month (intermittent) of the calendar year as a result of ground-water discharge or surface runoff. The term does not include an ephemeral stream which is one that flows for less than one month of a calendar year and only in direct response to precipitation in the immediate watershed and whose channel bottom is always above the local water table."

[4] 30 CFR 715.17(d)(1) reads in pertinent part: "Flow from perennial and intermittent streams within the permit area may be diverted only when the diversions are approved by the regulatory authority and they are in compliance with local, State, and Federal statutes and regulations."

Sunbeam's vice president/general manager testified that there was not an intermittent stream on the permit area before they began mining (Tr. 160). Flow from several areas above the permit area had been diverted as a result of the mining operation, increasing the amount of flow in the channel (Tr. 146-147). Sunbeam submitted a letter from a hydrogeologist with the Department of Environmental Resources of the Commonwealth of Pennsylvania indicating that, based on its knowledge of the area, Pennsylvania had considered the stream to be ephemeral under OSM regulations (Tr. 102-103; Exh. A).

The Administrative Law Judge found that the stream was intermittent and upheld the notice of violation issued for diverting its flow without regulatory authority approval. Sunbeam appealed this decision and both parties filed briefs.

Discussion and Conclusions

[1] OSM established a prima facie case that an intermittent stream existed prior to mining. The existence of an intermittent stream at the time of the inspection and on subsequent followup inspections raises a presumption that one existed before mining. OSM was also entitled to rely upon statements by the mine superintendent that an intermittent stream had existed before the inspection. *See Burgess Mining & Construction Corp.*, 1 IBSMA 293, n.4 at 296, 86 I.D. 656, n.4 at 657 (1979). *Cf. Island Creek Coal Co.*, 1 IBSMA 316, 320, 86 I.D. 724, 726 (1979). If this evidence had been uncontroverted, a finding that the stream had been intermittent before mining began would have been justified. *See James Moore*, 1 IBSMA 216, n.7 at 223, 86 I.D. 369, n.7 at 373 (1979).

[2] Sunbeam, however, did contest this evidence. It was shown that an intermittent stream was not indicated on Geological Survey maps. OSM countered this evidence with expert testimony that, under some circumstances, those maps do not show all streams that are intermittent under OSM regulations. OSM presented no testimony, however, that those circumstances existed in this case. Sunbeam's vice president/general manager testified that there was no stream in the area before mining began and that the drainage patterns were altered as a result of reclamation activities. Sunbeam testified that Pennsylvania was very familiar with the area because of work being done to seal adjacent

abandoned mine workings and because of the investigation of the area conducted prior to the granting of the permit. Sunbeam introduced a letter from Pennsylvania stating its reasons for defining the stream as ephemeral prior to mining. That letter shows knowledge of the specific area and of the definitions of intermittent and emphemeral streams.

OSM did not counter Sunbeam's evidence. Under the facts of this case, Sunbeam rebutted OSM's prima facie case that an intermittent stream existed prior to mining.

Therefore, the Feb. 4, 1980, decision is reversed and violation No. 3 of Notice of Violation No. 79–I–18–11 is vacated.

Newton Frishberg
Administrative Judge

Melvin J. Mirkin
Administrative Judge

Will A. Irwin
Chief Administrative Judge

UNITED STATES
v.
ALBERT MARTINEZ ET AL.

49 IBLA 360

Decided *August 29, 1980.*

Appeal from decision of Administrative Law Judge Sweitzer dismissing contest against the Martinez Nos. 1, 2, 3, and the south half of No. 4 placer mining claims. WY 38131.

Affirmed.

1. Mining Claims: Common Varieties of Minerals: Generally—Mining Claims: Determination of Validity—Mining Claims: Discovery: Marketability—Surface Resources Act: Generally

Sec. 3 of the Surface Resources Act of July 23, 1955, 69 Stat. 367, 368, 30 U.S.C. § 611 (1976), declared that common varieties of sand and gravel are not valuable mineral deposits under the mining laws. In order for a claim for such material to be sustained as validated by a discovery, the prudent man-marketability test of discovery of a valuable mineral deposit must have been met at the date of the Act, and reasonably continuously thereafter.

2. Mining Claims: Determination of Validity—Mining Claims: Discovery: Generally—Mining Claims: Discovery: Marketability

The prudent man test of discovery has been satisfied where minerals have been found in sufficient quantity and of sufficient quality that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. The marketability refinement of the prudent man test of discovery requires that the mineral locator must show that by reason of accessibility, bona fides in development, proximity to market, existence of present demand, and other factors, the mineral deposit is of such value that it can be mined, removed and disposed of at a profit.

3. Administrative Procedure: Burden of Proof—Administrative Procedure: Hearings—Mining Claims: Contests

When the Government contests a mining claim on a charge of lack of discovery of a valuable mineral deposit, it has assumed the burden of going forward with sufficient evidence to establish a prima facie case. Where a Government mineral examiner testifies that he has examined a claim and found the quantity of minerals insufficient to support a finding of discovery, a prima facie case of invalidity has been established and the burden shifts to the claimants to show by a preponderance of the evidence that a discovery has been made.

4. Administrative Procedure: Hearings—Mining Claims: Contests—Mining Claims: Discovery: Marketability

Where there is not sufficient reason shown to disturb an Administrative Law Judge's finding that the prudent man-marketability test was met as of July 23, 1955, and continuously thereafter by mining claimants who extracted and profitably sold sand and gravel from the claims prior to that date and continuously thereafter, the decision will be sustained on appeal.

5. Administrative Procedure: Hearings—Mining Claims: Contests—Mining Claims: Discovery: Marketability—Rules of Practice: Hearings

The Board of Land Appeals will not order a further hearing in a mining claim contest case where a patent application has been filed merely because the evidentiary record is inadequate to invalidate the claims for lack of a discovery of a valuable mineral deposit, if the claimant is found to have met the discovery test.

APPEARANCES: Paul J. Hickey, Esq., Rooney, Horiskey, Bagley & Hickey, Cheyenne, Wyoming for contestees; Patricia Boleyn Walker, Esq., Office of the Solicitor, U.S. Department of the Interior, Denver, Colorado, for contestant.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

INTERIOR BOARD OF LAND APPEALS

The United States of America, contestant, appeals from the decision, dated Mar. 12, 1979, of Administrative Law Judge Harvey C. Sweitzer dismissing appellant's contest complaint against Albert and Maximilian Martinez, contestees, as to the Martinez Nos. 1, 2, 3, and the south half of No. 4, placer mining claims. The 4 claims, situated in sec. 24, T. 22 N., R. 86 W., sixth principal meridian, Carbon County, Wyoming, were located for sand and gravel on June 18, 1955, 35 days prior to enactment of the Act of July 23, 1955, 69 Stat. 368, 30 U.S.C. § 611 (1976), which removed common varieties of sand and gravel from mining location.

In 1966, BLM instituted contest proceedings against Martinez claim No. 4. On Mar. 27, 1970, the Hearing Examiner, L. K. Luoma,[1] found that there was a discovery of a valuable mineral deposit on the claim prior to July 23, 1955, and that the discovery continued to exist to the time of the decision.[2] Following submission of patent applications for all 4 claims, BLM issued a contest complaint against the claims Dec. 12, 1975. A hearing was held before Judge Sweitzer on Dec. 21 and 22, 1977, in Cheyenne, Wyoming.

The parties stipulated to the issues to be resolved at the hearing. They were:

1. Whether the lands included in the South Half of Martinez No. 1, the North

---

[1] The Civil Service Commission changed the title of Hearing Examiner to Administrative Law Judge on Aug. 19, 1972. 37 FR 16787.

[2] *United States* v. *Albert Martinez and Max Martinez*, Wyoming Contest No. 0252640, Mar. 27, 1970.

> Half of Martinez No. 3, and the North Half of Martinez No. 4 placer mining claims are nonmineral in character in accordance with the application of the "Ten Acre Rule".
>
> 2. Whether the sand and gravel contained within the subject claims is locatable under the mining law, or whether the material is suitable only for fill purposes, road base or comparable use.
>
> 3. Whether the Contestees have discovered valuable minerals within the limits of Martinez No. 1, Martinez No. 2, and Martinez No. 3 placer mining claims.
>
> 4. If a discovery of a valuable mineral has been made within the limits of the subject claims, whether said discovery has continued from the date of location to the present time with regard to Martinez No. 1, Martinez No. 2, and Martinez No. 3 placer mining claims and from March 27, 1970, to the present time with regard to Martinez No. 4 placer mining claim.

Decision, p. 3.

At the hearing the Government mineral examiner testified that he examined the claims, studied the market and concluded that a prudent person would not be justified in spending time and money in developing these claims. The contestees produced two expert witnesses, a registered engineer and surveyor, and a consulting geologist, both of whom concluded, after examining the claims, that a person would have a reasonable prospect of developing a profitable mining operation on the claims. Albert Martinez, one of the contestees, testified that he and his brother Maxmilian had operated the claims continuously since June 1955, deriving most of their income from the claims. Judge Sweitzer ruled that the Government established a prima facie case of no discovery but the contestees satisfied their burden of showing by a preponderance of the evidence that a discovery of a valuable mineral deposit was made prior to July 23, 1955, and continued to the time of the hearing on all 4 claims, excepting the north half of Martinez No. 4 which contestees conceded is not mineral in character.

On appeal, appellant–contestant challenges the sufficiency of contestees' evidence to meet the contestees' burden of proof, pointing to their failure to provide a detailed cost analysis comparing expenses and earnings. Contestant argues that its expert used market figures supplied by the State of Wyoming and his own estimates of quantity in concluding that the claims could not be mined at a profit. Contestant asserts that contestees failed to supply the specific, probative evidence of a valuable mineral discovery necessary to overcome the Government's prima facie case. Contestant reiterates its contention that the south half of claim No. 1, and the north half of claim No. 3 are nonmineral in character. Finally, contestant asks for a further hearing in the event this Board finds the evidence inadequate to invalidate the claims. Contestant submitted no offer of additional proof in support thereof.

Contestees' answer to the statement of reasons pointed to Albert Martinez's testimony concerning his earnings from the claims and to an asserted lack of foundation for the cost analysis relied on by contestant as grounds to affirm the decision below. Contestees assert that the evidence shows the claims have been operated at a profit for 24 years and that they have met the requirements of law for patents.

[1] Sec. 3 of the Surface Resources Act of July 23, 1955, 69 Stat. 368, 30 U.S.C. § 611 (1976), declared that common varieties of sand and gravel and certain other materials are not valuable mineral deposits under the mining laws (30 U.S.C. § 22 (1976)); *United States* v. *Coleman*, 390 U.S. 599 (1968). In order for a mining claim for a common variety of sand or gravel located prior to the Act of July 23, 1955, to be sustained as a claim validated by a discovery, the prudent man-marketability test of discovery of a valuable mineral deposit must have been met at the time of the Act, *Barrows* v. *Hickel*, 447 F.2d 80, 82 (9th Cir. 1971); *Palmer* v. *Dredge Corp.*, 398 F.2d 791, 795 (9th Cir. 1968), *cert. denied*, 393 U.S. 1066 (1969), and reasonably continuously thereafter. *United States* v. *Taylor*, 19 IBLA 9, 82 I.D. 68 (1975); *State of California* v. *Doria Mining & Engineering Corp.*, 17 IBLA 380 (1974).

[2] The prudent man test requires a showing of minerals in sufficient quantity that: "[A] person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine." *Castle* v. *Womble*, 19 L.D. 455, 457 (1894), *approved in Chrisman* v. *Miller*, 197 U.S. 313, 322 (1905). The marketability refinement of the prudent man test requires that the claimant show that by reason of accessibility, bona fides in development, proximity to market, existence of present demand, and other factors, the mineral deposit is of such value that it can be mined, removed and disposed of at a profit. *United States* v. *Coleman*, *supra;* Solicitor's Opinion, 54 I.D. 294, 296 (1933), *approved in Foster* v. *Seaton*, 271 F.2d 836, 838 (D.C. Cir. 1959), and *recognized in Verrue* v. *United States*, 457 F.2d 1202 (9th Cir. 1972).

[3] In a mining claim contest, the Government has assumed the burden of going forward with sufficient evidence to establish a prima facie case. The testimony of a Government mineral examiner that he has examined the claim and found the mineral value insufficient to support a finding of discovery establishes the prima facie case and shifts the burden to the claimant to show by a preponderance of the evidence that a discovery has been made. *United States* v. *Taylor*, *supra.*

At the hearing, Larry Steward and Frederick Georgeson, BLM mineral specialists, testified for contestant. Most of the contestant's case was based on Steward's expert opinion. He examined the claims in 1974 and 1975. His testimony is summarized by Judge Sweitzer as follows:

> During part of these examinations he was accompanied by Albert Martinez, one of the Contestees. Mr. Martinez identified places on the claims where samples of the sand and gravel should be taken. Mr. Steward noticed numerous holes or pits on the various claims which were identi-

fied and noted on a map of the claims. (Ex. 4.) Some of the pits showed evidence of having had material removed from them recently, while others displayed no activity for a considerable period and some were essentially depleted of any sand and gravel deposits they may have contained. (Tr. 21–24, 29, 30.)

Mr. Steward testified to having taken "enough samples to get a representative idea of the sand and gravel deposits" located on the claims. (Tr. 30.) On the basis of his physical examination of those samples, Mr. Steward concluded that the materials from the deposit have no "special unique physical characteristics."[2] (Tr. 52.)

No samples taken from the 1974 and 1975 examinations were received in evidence nor was there evidence of any laboratory analyses concerning the quality of the mineral. Also, no scientific estimate of quantity of material was made by Mr. Steward on the Martinez claims nor on other competing deposits in the market area of the claims. (Tr. 63–66.) Nevertheless, Mr. Steward concluded that the mineral deposits on the claims were not essentially different from other deposits of sand and gravel in the area. *See e.g.* Tr. 61.

Mr. Steward testified to having made a market study in the area. He concluded that there was a market for sand and gravel for use as concrete aggregate, mortar sand, and fill material in the Rawlins, Wyoming, trade area, which would constitute the general market area for the contested claims. He indicated, concerning three representative years, that the Martinez operation, presumably the four contested claims, supplied 15 percent of this total market demand in the area of approximately 14,000 cubic yards in 1955; 7 percent of the market demand totaling approximately 20,000 cubic yards in 1966; and less than 2 percent of the market demand totaling 34,000 cubic yards for 1974. (Tr. 76–78.) The market figures were assertedly obtained from the State Inspector of Mines and the Ad Valorem Tax Division of the State of Wyoming. Further foundation as to how the market figures were arrived at was not developed on the record. The Martinez production figures were based upon examination of the Martinez records, Exhibits I, N–W. This information indicates that, in addition to the three representative years discussed above, some materials were marketed yearly from the time of the claims' location in 1955 until the time of hearing.

Mr. Steward gave his opinion concerning whether or not the claims could be operated at a profit. From his examination of the Martinez books and his knowledge of market conditions, he made an economic study of the claims. He concluded that, had the sole source of income been the sand and gravel from these claims, the Martinez operation would have lost 20 cents per cubic yard of material sold in 1955 and at least 80.7 cents per cubic yard in 1977. His conclusion was based upon an an allocation of equipment costs according to acquisition costs supplied by Albert Martinez (Tr. 80), labor costs in the mine on an assumption that one full-time employee would be required eight hours per day and five days per week (Tr. 91), and did not include indirect costs such as permits, taxes, or insurance. (Tr. 92–93.) The exact costs of labor and equipment depreciation were not entered in the record. On this basis Mr. Steward concluded that a person of ordinary prudence would not be justified in expending further time and monies with a reasonable prospect of success in developing a paying mine on the claims. (Tr. 123.)

Decision, pp. 4 and 5.

Appellant disputes one specific finding made by Judge Sweitzer, namely, that Mr. Steward did not make a scientific estimate of quantity of material on the claims and on other competing deposits in the market area. It is apparent he did not estimate other competing deposits. However, he did estimate a quantity of sand and gravel material on the claims which is quite close to that of contestees' witness, except as to claim 3 (*see* quotation, *infra*). Thus, Judge Sweitzer's decision is corrected to reflect this estimate found at Tr. 99, as follows for each claim: 36,300 cubic yards on the Number 1 claim; 29,000 cubic yards on Number 2; 21,780 cubic yards on the Number 3; and 25,000 cubic yards on the Number 4. The Judge found that the contestant had established a prima facie case that there has been no discovery of a valuable mineral deposit on each of the claims based upon Steward's opinion. He found, however, that there was a lack of foundation as to the basis of the opiniion that the mining operations could not be profitable and stated that this detracts from the weight given to it. He found that contestees' evidence preponderated on the issue of marketability at a profit.

---

[2] As the claims were located prior to the Act of July 23, 1955, *supra*, it is not necessary that the materials have "distinct and special value" to remove them from the effect of the Act as it pertains to the location of common varieties of sand and gravel. That is, if the materials on the claims have sufficient quality to have been marketable from the time of their discovery to the present, the claims are not invalid for lack of "distinct and special value."

He summarized the contestees' evidence as follows:

> Mr. Robert Jack Smith, a registered professional engineer and land surveyor from Rawlins, Wyoming, testified as an expert witness for Contestees. Mr. Smith surveyed the claims in 1955 and inspected the claims in 1969 and in 1977 and was familiar with the history and present condition of the contested claims. He estimated that at least the following quantities of sand and gravel existed on the claims at the time of the hearing: 30,000 cubic yards on Martinez No. 1; 31,000 cubic yards on Martinez No. 2; 38,000 cubic yards on Martinez No. 3; and 23,000 cubic yards on Martinez No. 4. (Tr. 207–208.) He testified that the Rawlins area was experiencing tremendous growth and that the demand for construction materials was very high. (Tr. 208–214.) He stated that based upon the existence of a market for the materials and the deposit on the claims being of a nature which lends itself to economical mining, he would advise a person to invest money and labor in developing the claims. (Tr. 216–217.) [*See also* Tr. 233–234.]
>
> Mr. James Elliott also testified for Contestees. Mr. Elliott is a consulting geologist from Laramie, Wyoming, with an extensive educational background in hydraulics and soil mechanics. (Tr. 237.) He has analyzed the quantities and quality of sand and gravel deposit with the Wyoming Highway Department. (Tr. 238.) He examined excavations on all four claims in November 1977 and concluded that from the nature of the deposits a person would have a reasonable prospect of developing a profitable mining operation on the claims.
>
> Mr. Albert Martinez, one of the two Contestees testified. He related that his initial discovery was in June 1955 and testified that he marketed sand and gravel from the claims prior to the effective date of the Act of July 23, 1955. He testified that he and his brother (the other Contestee) have been operating the claims continuously since their location (Tr. 281) and he estimated that he could continue the operation for an additional ten to fifteen years (Tr. 288).
>
> Recent claim activities related by Mr. Martinez (and partially substantiated by written receipts) indicate rather significant operations. He stated that $15,732 had been derived from the claims for the first ten months of 1977. (Tr. 314 and Ex. W.) These figures reflect income before deduction of expenses. Overhead expenses were not recorded in Contestees' ledgers and net profit calculations were mere estimates. Nevertheless, Contestees estimated that most of their income came from operation of the claims through the

> sale of sand and gravel and the hiring out of themselves and the equipment otherwise used to operate the claims. They did not submit expense records for claim operations nor did they allocate expenses and depreciation between the sale of materials and the hiring out or rental of equipment.
>
> Since part of Claim No. 3 and all of Claim No. 4 are east of the river, it may not be mined year-round because of access problems. According to Mr. Martinez, material nevertheless may be marketed from this area by stockpiling material on the west side of the river when the river is low and easily fordable. (Tr. 285.)

Decision, pp. 5–7.

[4] The Judge's ultimate finding is that the contestees by their actions have shown that a profit has been made from mining the claims from 1955 to the time of the hearing and that they are justified as prudent men in the further expenditure of time and means in operating the claims. In reaching this conclusion, the Judge stressed that the best evidence of what a prudent man would do in the same or very nearly the same circumstances is what miners have or have not done over a period of years. *See United States* v. *Wichner*, 35 IBLA 240 (1978). Thus, he gave greater weight to the contestees' evidence that they had made a livelihood from the claims than to the mineral examiner's opinion which was based upon hypothetical calculations, without a full disclosure of figures to show the analysis (*see* Tr. 74–92). Such a weighing is appropriate.

We see no reason to overturn the Judge's findings in this case based on the record before us, despite appellants' contentions that the Judge did not give adequate weight to Steward's expert opinion. We cannot agree that the Judge misapplied the law of discovery and the burden of proof to the facts here. We note that there is no evidence of lack of good faith on the part of the contestees and no evidence showing any value in the land apart from the sand and gravel deposits within the claims. The evidence does not establish that the material was used for purposes for which nonlocatable mineral could be used which would not be considered as qualifying uses.

This case is different from many other sand and gravel cases where there has been little, if any, actual extraction of the materials before and for a long time after 1955. Here there were actual sales prior to July 23, 1955, and continuous sales each year thereafter to the date of the hearing. It is clear that the market demand for sand and gravel in the area is continuing and greatly increasing. Although by Steward's calculations, appellants' percentage of capture of the market demand in the area has diminished from 15 percent in 1955, to 7 percent in 1966, to less than 2 percent for 1974, this does not establish that a prudent man would not expect to market the sand and gravel profitably as of the time of the hearing. Steward admitted there is adequate access to the claims[3] (Tr. 130) and that the market for sand and gravel in the area has been increasing steadily (Tr. 74–78). There was unrebutted evidence by contestees that sand from the claims is suitable for mortar purposes, that other sources of sand and gravel in the area cannot supply sand suitable for mortar as good as that from the claims, and that the projected market for mortar sand is excellent due to expected growth of population in the area and projected construction projects.

---

[3] With the exception of the north half of claim No. 4.

Much of the objection raised by appellant is with the lack of detailed evidence by contestees of the costs of their operations. The Judge explained the discrepancy between contestant's and contestees' evidence on profitability in large part because of a difference in accounting and cost allocation. He concluded that the contestant's costs were not appropriate because they were based on a more continuous and larger mining operation than that actually conducted by contestees. This made a great difference in apportioning labor costs and the amortization of equipment. Although the Judge found that contestees did not allocate expenses and depreciation between the sale of materials and the hiring out or rental of equipment, there was a rough estimate by Albert Martinez regarding income which would bear upon cost allocation. He testified that 90 percent of his income came from the contested claims (Tr. 283), with a profit sufficient to make a living (Tr. 309). In 1954 and 1955 about 10 percent to 15 percent of the sales of sand and gravel came from another property (Tr. 326, 366). He also testified he had purchased equipment from the income received from his sales of sand and gravel. The income from the contestees' total operations are reflected by the ledger books submitted as exhibits at the hearing (Exhs. I, N-W). Some expenses are reflected there, such as repairs on equipment, but not costs of equipment. While their bookkeeping system does not clearly show their net income for the years, it does evidence consistent sales with a reasonable gross income for a small sand and gravel operation since 1955.

Judge Sweitzer had the opportunity of personally observing the demeanor of the witnesses. He accepted and gave great weight to Albert Martinez's testimony that he and his family had made a good livelihood from the sand and gravel operations from the claims, and that the operation was profitable and could continue to be profitable. We see no adequate reason for disturbing the Judge's findings that the prudent man-marketability test was satisfied here and that the contestees have met their burden of proof for claims Nos. 1, 2, 3, and the south half of No. 4. Therefore, his decision is sustained on appeal. The evidence shows excavations of sand and gravel on the south half of No. 1 and north half of No. 3, refuting the assertion that the land is nonmineral in character. The evidence shows no excavations on the north half of claim No. 4; contestee conceded that the land was nonmineral in character and that determination will stand.

[5] The remaining issue concerns appellant's request that if the Board finds "the evidentiary record is inadequate to invalidate the claims, it is respectfully requested that the case be remanded for further hearing." The only justification

for this request is the fact a patent application for the claims has been filed. Appellant cites *United States* v. *Taylor*, *supra*, and also *United States* v. *Guzman*, 18 IBLA 109, 81 I.D. 685 (1974). In *United States* v. *Taylor*, we addressed the circumstances where a patent application has been filed in relation to the burden of proof question and stated, at 19 IBLA 25, 26, 82 I.D. 74:

> If a patent application has been filed, it is essential for this Department to determine whether all the requisites of the law have been met before patent may issue. If there has not been evidence presented on an essential issue, or issues, dismissal of the contest will not fulfill this Department's obligation to act "to the end that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved." *Cameron* v. *United States*, 252 U.S. 450, 460 (1920). Therefore, in a patent proceeding, it would be essential to order a further hearing to make a proper determination on the essential issues.

Appellant seems to be saying that in every patent application case if this Board cannot find the claim invalid because of a lack of discovery of a valuable mineral deposit, we must order a further hearing. This is incorrect and is not what *United States* v. *Taylor* holds. As the statement quoted above clearly shows, a hearing is essential if there has not been evidence presented on an issue, or issues, essential to determine the validity of the claim. Appellant has pointed to no such issue. It points only to deficiencies in contestees' case concerning the costs of their mining operation. This goes to an aspect of the discovery test. While specific detailed information was lacking, there was evidence that contestees' operations were profitable and expert opinion testimony that a prudent man could profitably operate the mine. The Judge weighed all of the evidence and made his findings on the prudent man-marketability test of discovery as of July 23, 1955, and as of the date of the hearing. If there had been no evidence to show the test was met as of either July 23, 1955, or through the date of the hearing, which are separate issues, a further hearing would be appropriate. However, evidence was presented relating to the application of the tests as of those dates and the time between those dates. If there is some other issue which has not been raised before in this contest proceeding which is essential to the patentability of these claims, it is incumbent upon contestant to take appropriate action to raise such an issue. None has been brought to our attention. Without more being shown to warrant a further hearing, we see no justification for ordering one in these circumstances. Therefore, the request for a hearing is denied.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from its affirmed.

JOAN B. THOMPSON
Administrative Judge

WE CONCUR:

JOSEPH W. GOSS
Administrative Judge

ANNE POINDEXTER LEWIS
Administrative Judge

U.S. GOVERNMENT PRINTING OFFICE : 1980 O - 328-199 : QL 3

ANDREW L. FREESE

50 IBLA 26

Decided *September 9, 1980*

Appeal from a decision of the Idaho State Office, Bureau of Land Management, denying a petition for deferment of assessment work on various unpatented lode mining claims and millsites. I 14532.

Affirmed as modified.

1. Mining Claims: Generally—Mining Claims: Assessment Work

In order to obtain a temporary deferment, a claimant must file with the authorized officer of the proper office a petition in duplicate requesting such deferment. The applicant must attach to one copy thereof a copy of the notice to the public required by the Act which shows that it has been filed or recorded in the office in which the notices or certificates of location were filed or recorded.

2. Mining Claims: Generally—Mining Claims: Assessment Work

A petition for deferment of annual assessment work is properly denied where a claimant's mining claims and millsites have been declared null and void by the Department.

APPEARANCES: Andrew L. Freese, pro se.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

INTERIOR BOARD OF LAND APPEALS

Andrew L. Freese appeals from a Feb. 6, 1980, decision of the Idaho State Office, Bureau of Land Management (BLM), which rejected his petition for deferment of assessment work on appellant's mining claims, which are located within the Sawtooth National Recreation Area.[1] The decision noted that appellant had failed to attach a copy of the required notice to the public, showing that it had been filed or recorded in the office in which the notices or certificates of location were filed or recorded. *See* 43 CFR 3852.2(a). Secondly, the BLM decision adverted to an order entered by the United States Court of Claims dismissing a suit brought by petitioner relating to all of the instant mining and millsite claims.

The "Pole" group of mining claims and millsites were the subject of a Government contest I–9758. By decision dated Mar. 6, 1978, Administrative Law Judge Harvey C. Sweitzer declared all of the claims null and void. On Apr. 22, 1978, while the case was on appeal to this Board, appellant requested a deferment of annual assessment work for the "Pole" mining claims, pending the outcome of his appeal. This application was deficient for various reasons, and on May 18, 1978, appellant filed a second petition accompanied by the required fee and containing the additional information requested. On July 26, 1978, the State Office granted appellant's request for deferment of assessment work for the period from Oct. 1, 1977, to Sept. 30, 1978.[2] On Sept. 6, 1978, subsequent to the grant of this deferment, the Board, by decision styled *United States* v. *Freese*, 37 IBLA 7 (1978), affirmed the decision of the Administrative Law Judge in all respects.

---

[1] The mining claims and millsites will be treated as two distinct groups for the purposes of this decision. The "Pole" group will consist of: Pole #3 through #16, Pole #18, Pole #21, Pole #31, Pole A, B, and C, URA, and WO3. The "URA" group will include the URA #2, URA #4, URA #5, URA #9, URA #10, URA #11, URA #13, URA #14, and She Lode.

The "URA" group of mining claims and millsites were the subject of a separate contest I-13341. The contest complaint in this case had been filed on Apr. 27, 1977, and an answer was duly filed. After various postponements a hearing was scheduled for May 22, 1979. On Feb. 26, 1979, however, attorney for appellant "withdrew his opposition to the contest." By order dated Mar. 8, 1979, Administrative Law Judge Michael L. Morehouse took the allegations of the complaint as admitted and declared all of the claims null and void. No appeal was taken from this decision.

Appellant filed a suit for judicial review of the Board's decision in *United States* v. *Freese*, *supra*, in United States District Court, *sub nom. Freese* v. *Andrus*, Civ. 78-1314 (D. Idaho, filed November 20, 1978). That suit was voluntarily dismissed without prejudice. Appellant had
also filed suit in the United State
Court of Claims, seeking, *inter ali*
compensation for alleged invers
condemnation of the mining clain
and millsites in both the "Pole" an
"URA" groups. *Freese* v. *Unite*
States, No. 334-78 (Ct. Cl., file
July 24, 1978). On October 10, 197
appellant sought a second defer
ment of annual assessment require
ments, expressly referring to hi
suit in the Court of Claims.

On Nov. 9, 1979, the Court
Claims dismissed appellant's suit r
garding all of the claims at issu
herein, expressly finding that it di
not have jurisdiction tc review th
Department of the Interior's con
clusion that these claims were in
valid. On Feb. 6, 1980, the Idah
State Office issued the decisio
which is the subject of the instan
appeal.

Initially, we would note that
the extent that appellant sought
deferment of annual assessmen
work for the five subject millsite
the petition must be rejected, thoug
not for the reasons given by th
State Office. Succinctly stated, the
is no requirement that a millsi
claimant perform *any* assessmen
work. It is impossible to grant
meaningful and efficacious defe
ment where there is no requiremen
to perform assessment work.

[1] With regard to the questio
whether or not appellant had file
a copy of the notice to the publi
required by the applicable regul
tion, 43 CFR 3852.2(a), appellan
points out that the certification w
located in the middle of his petitio

---

[2] Pole #17 lode mining claim was included within this application. Pole #17 was originally included in contest No. I-9758, but was dismissed from the proceeding. By separate decision of July 26, 1978, the requested deferment for this claim was denied on the grounds that since it was no longer involved in the contest proceeding there was no basis for granting a deferment.

for deferment, and further argues that this was precisely the method he had utilized in his earlier petition, which BLM had granted. With regard to the statement of the recorder that such a notice was recorded, appellant argues that a great deal of time transpires between the filing and recording of a notice, and the receipt of proof of recordation from the county recorder's office, and that in the instant case appellant did not receive the notice from the county recorder until Feb. 4, 1980, only two days prior to the State Office decision.

As regards the form of the certification, the record bears out appellant's contention. The form of certification which appellant utilized in his second petition for deferment is exactly the same as that which he used in his original petition which the State Office granted. Thus, we are led to the conclusion that it was the absence of a certification by the county recorder, attesting that the petition had been filed with that office, which served as the basis for the State Office's decision. We feel that were this the only deficiency in appellant's petition, the State Office's decision could not be sustained. The State Office should have informed appellant of the deficiency and given him an opportunity to supply the necessary document. We note that appellant's original petition for deferment had been deficient in a number of ways, including a failure to submit the requisite filing fees. His petition was not rejected at that time; rather, he was given an opportunity to cure the deficiencies. We see no reason why such an opportunity was not afforded appellant herein.

[2] The State Office, however, also premised its rejection of appellant's petition, on the decision of the Court of Claims dismissing appellant's suit as concerned the instant claims. Appellant contends that the decision of the Court of Claims was interlocutory in nature and that he intends to pursue his appeal to the United States Supreme Court. But until a court of competent jurisdiction rules otherwise, appellant's claims have been finally determined by the Department to be a nullity. With particular regard to the "URA" group of claims, we would point out that appellant withdrew his answer to the Government contest, which Judge Morehouse correctly found was the same as admitting the charges contained in complaint I–13341. Appellant failed to appeal judge Morehouse's decision to this Board. Thus, appellant did not exhaust his administrative remedies, as required by 43 CFR 4.21(b), and may not now seek judicial review. *See Rawls* v. *Secretary of the Interior*, 460 F.2d 1200 (9th Cir. 1972). The "URA" claims have been finally held to be invalid, and no deferment for assessment work can be granted as no claims now exist.

Concerning the "Pole" group of claims, we note that the applicable statute, sec. 1, c. 232 of the Act of June 21, 1949, 63 Stat. 214, 30

U.S.C. § 28b (1976), provides, in pertinent part, that:

> [Annual assessment work] may be deferred by the Secretary of the Interior as to any mining claim or group of claims in the United States upon the submission by the claimant of evidence satisfactory to the Secretary that such mining claim or group of claims is surrounded by lands over which a right-of-way for the performance of such assessment work has been denied *or is in litigation* or is in the process of acquisition under State law or that other legal impediments exist which affect the right of the claimant to enter upon the surface of such claim or group of claims or to gain access to the boundaries thereof. [Italics supplied.]

Appellant argues in effect that the claims are still in litigation and that therefore he clearly qualifies for a deferment. While the absence of any meaningful punctuation in this section clearly creates interpretative problems, the sequence of phrases, as well as the legislative history, demonstrates that it is not the "claims" which must be in litigation, but rather "access" to the claims must be the subject of dispute.

With reference to the sequence of phrases, it must be noted that the phrase "or is in litigation" is followed by the phrase "or is in the process of acquisition under State law." This section is, necessarily, only applicable to unpatented claims, the legal title of which resides in the United States until issuance of patent. Thus, if the antecedent of this latter phrase were "mining claim" this section would be insensible as there is no authority by which State law may permit the acquisition of lands in Federal ownership. This phrase must, therefor
relate to access to the claim rath
than the claim itself.

The legislative history of this se
tion, though meager, supports th
interpretation. Examples of situ
tions in which the provisions of th
law could be invoked were provid
in S. Rep. No. 405. The Congr
particularly noted that the b
would cover "[d]elays in causi
legal condemnation of rights-
way, which can be contested for
long time in the courts." S. Rep. N
405, 81st Cong., 1st Sess. reprint
in [1949] U.S. Code Cong. & A
News 1404. Concerning the phra
"is in litigation" the Senate rep
took express notice of the "[d]ela
in overcoming by court action t
posting of 'No trespass' signs
roads which have been used by
public for many years but ha
never been declared public road
Id. Thus, it is clear that the subj
matter of the litigation must be
cess to the claim and not the cla
itself.

The final alternative listed in s
28b, however, relates to a showi
that "other legal impediments ex
which affect the right of the clai
ant to enter upon the surface of su
claim." Appellant argues that it
unlikely that the administration
the Sawtooth National Recreat
Area will approve an operati
plan for the performance of asse
ment work as required by 36 C
292.18(c).

The Board has interpreted t
part of sec. 28b on a number
different occasions, most recently
Charlestone Stone Products, I

32 IBLA 22 (1977). Therein, the Board stated:

> The major policy goal implicit in the language of this statute is the protection of claimants whose rights of access to their claims have been impeded or denied. The relief provisions of the statute are intended to be triggered by considerations of relative necessity, not inconvenience or ordinary business risk.

Id. at 23. In that case, the Board noted that its decision, while still in litigation, had been reversed by the district court, and held that "this legal dispute, even if ultimately prolonged by a grant of certiorari by the United States Supreme Court, does not constitute a 'legal impediment' within the meaning of [sec. 28b]." *Id.*

A significantly different problem is presented in the instant appeal. Unlike the lands embraced by the *Charlestone Stone Products* claims, lands within the Sawtooth National Recreation Area are not open to new mineral entries. *See* sec. 10, Act of Aug. 22, 1972, 86 Stat. 612, 614, 16 U.S.C. § 460aa-9 (1976). Moreover, there has been no judicial disturbance of the Board's decision relating to the invalidity of the claims, though appellant avers that he intends to pursue this matter to the Supreme Court. In effect, the question is whether it is possible to grant a petition for deferment of assessment work when the claim for which the petition is sought has been determined finally, within the Department, to be invalid where there has been no contrary judicial finding. We hold that such a petition may not be granted; allowance of such a petition would constitute an action directly contrary to, and inconsistent with, the finding of invalidity.

While it is possible that a Federal court may subsequently determine that the Department's decision invalidating a claim was erroneous, until such a decision is rendered there is no cognizable claim against the Government. In the absence of a timely appeal, the decision of the Department is final and of immediate effect. The effect of a court reversal is to reinstate a claim, on a *nunc pro tunc* basis. But until such action occurs, there is no claim extant. Thus, there is no assessment work obligation, and no possibility for obtaining a deferment of assessment work.

To hold otherwise would require that the Government grant a deferment of assessment work for a claim whose existence the Government denies. Moreover, inasmuch as the statute provides for only 2 years of deferment, regardless of the justification (*see Charlestone Stone Products*, *supra* at 24; 30 U.S.C. § 28c (1976)), the Government might well be require, even in the case of withdrawn land, to permit the performance of assessment work, and the concomitant surface disturbance, in situations in which the Department has declared the claim a nullity. At least as regards withdrawn land, such a result would seem contrary to elementary logic.

The unavailability of a deferment, however, does not prejudice the rights of a mineral claimant. To the extent that the land is open to mineral entry, a claimant would still have the right to go out onto the land and perform assessment work such as would protect him from adverse claims by third-parties. As regards those claims embraced by withdrawals, there is no possibility of the initiation of new adverse claims by third-parties, and so long as notices of intention to hold the claim were annually filed as required by sec. 314 of the Federal Land Policy and Management Act of 1976, 90 Stat. 2743, 2769, 43 U.S.C. § 1744 (1976), there can be little doubt that, should a Federal court reverse a determination of invalidity, the failure to actually perform assessment work would not independently serve as a predicate for invalidating the claim.

In conclusion, we hold that upon the final determination by this Board that a claim is invalid, and absent an intervening decision of a Federal court contrary thereto, no deferment of annual assessment work may be granted.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

James L. Burski
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Frederick Fishman
Administrative Judge

APPEALS OF ALLIED DRILLING, INC.

IBCA-1242-1-79 & IBCA-1250-2-79

Decided *September 12, 1980*

Appeals denied.

Contract No. 14-08-0001-17706, Geological Survey.

1. Contracts: Disputes and Remedies: Termination for Default: Generally

Where a contract specifies the complement and standard for drilling equipment to be furnished, neither the preaward survey of appellant's equipment, nor the commencement of performance with incomplete and admittedly noncompliance equipment is deemed a waiver of the contract requirement, and a default termination after issuance of a "cure notice" is upheld upon the failure of the contractor to provide equipment as specified in the contract.

APPEARANCES: Larry Durkan, President, Allied Drilling, Inc., Santa Rosa, California, for Appellant; John S. McMunn, Department Counsel, San Francisco, California, for the Government.

OPINION BY ADMINISTRATIVE JUDGE LYNCH

INTERIOR BOARD OF CONTRACT APPEALS

These appeals result from the default termination of appellant's contract for drilling approximately 130 holes in various Western States for the purpose of securing earth heat-flow data. The work was to be performed pursuant to delivery orders issued by the Government within the performance period of 12 months, with each order specifying the number and location of specific wells to be drilled. The contract specified payment to be made at unit prices in the schedule for the mobilization and demobilization of equipment, equipment rental and, personnel costs. The estimated cost for the work to be performed was $271,750. The indefinite quantity contract for services to drill the wells was awarded on Oct. 31, 1978. The contract provided as follows in Article D.4 and D.5 for the equipment and specifications therefor to be used:

D.4. ***Drilling Plant Rental***: The Government shall pay the Contractor an hourly rental rate for a completely equipped drilling plant subject to the following conditions and specification: a) The drill shall be equivalent to a Mayhew 1000 with 500 cfm x 50 psi or larger air compressor and 5 x 6 or larger duplex slush pump, mounted on a 4 x 6 or 6 x 6 truck or ample GVWR to carry 500 feet of 2⅞" drill pipe loaded in side racks; b) The water truck shall consist of a 4 x 6 or [*sic*] 6 x 6, 2000-gallon capacity self-loading truck with pipe racks, mud storage, water tank heater, tow bar hitch and shall be of ample GVWR to carry 500 feet of 2⅞" drill pipe plus 1500 pounds of mud and 2000 gallons of water; c) The service pick-up shall be ¾ ton rated, equipped with tow bar and shall include equipment for arc welding plus gas welding and cutting; d) The drilling plant shall also be equipped with all necessary tools, hoses, pumps, drill pipe, drill collars, subs, fishing tools, core barrels, lubricants and spare parts as required to maintain the equipment in proper working order; e) The rental rate shall include an experienced driller and two experienced helpers and shall apply to all operations such as drilling, moving between sites, coring, running casing, grouting, fishing, logging, etc., as long as the drill crew is on site and available for work.

D.5. ***High-Pressure Air Compressor and Downhold Hammer Rental***: The Government shall pay the Contractor an hourly rental rate for a completely equipped high-pressure air compressor and downhole hammer subject to the following conditions and specifications: a) The air compressor shall have a minimum manufacturer's rating of 750 cfm at 250 psi, and shall be truck mounted (if not mounted on the drill truck) and shall include all necessary hoses, accessories, spare parts, fuel and lubricants to maintain the compressor in proper working order; b) The downhole hammer shall be rated for 200 psi input with bit sizes of 5" to 5½"; c) The Contractor shall also furnish a water/soap-injection pump capable of pumping sufficient fluid to control dust and water infiltration; d) The hourly rental rate shall apply whenever the compressor and hammer are on site and available for use; e) Time spent transporting the compressor between drill sites shall be chargeable at the hourly rental rate as shown in Section D, Item 3.

Background

Mr. Moses, the contracting officer's representative (hereinafter COR), made a preaward survey of appellant's equipment with which the contract work was to be performed. He found the drilling rig, air compressor, downhole hammer, and water truck did not meet the contract specifications (Tr. 9). Despite the deficiencies noted in the equipment he was shown, he recommended award of the contract to Allied based on the assurances that equipment in compliance with the contract was on order or arrangements were being made to secure an adequate complement of equipment (Tr. 15). Delivery order No. 1 was issued on Nov. 6, 1978, calling for the drilling of 10 to 20 holes in California. The first site was Boonville, California, where mobilization of equipment was commenced by appellant on Nov. 7, 1978. Appellant's Exhibit A consists of the daily drilling logs from Nov. 7 to Nov. 15, 1978. These logs show for November 7 that 5 feet of conductor was set and the afternoon was spent repairing the water truck which had broken down on the way to the site and then bringing a load of water to the site. The log for November 8 shows drilling from 8 a.m. to 12 p.m. to a depth of 300 feet and the afternoon making repairs to equipment. The November 9 log shows reaming to the previous depth for 2 hours, then drilling for 3 hours to 370 feet when the water supply ran out around 1 p.m. and the air compressor broke down, requiring the remainder of the day for repairs. The log for November 10 shows only equipment repairs and waiting on a part needed for repairs. There is no log sheet for Saturday, November 11. The log for Sunday, November 12 indicates appellant's personnel went to the site to continue repairs and encountered heavy rain, necessitating the drilling rig to be moved to bottom of the hill. Work indicated on the log for November 13 consisted of work on drilling rig, installation of cement pump, reaming of previously drilled hole and then 1 hour or more of drilling to 440 feet. At this point the water supply ran out and a hydraulic hose broke requiring shutdown. The November 14 log shows 1 hour of servicing and repair of drilling rig, and day long effort to ream the hole without success due to repeated loss of circulation. On November 15 there was 1½ hours of service and repair work and 7 hours effort to run 1 and ¼ pipe in hole washing down with mud pump. The location was then abandoned and the equipment moved to the bottom of the hill.

Concurrent with the above efforts to drill the first well, the COR was present at the site, noting the absence of some of the equipment required by the contract, and discussing with appellant's personnel the need for such equipment. Mr. Durkan, appellant's President, was not at the drilling site. The COR noted in his testimony (Tr. 17–27) tha the water truck was not present on the first day of mobilization, and that upon appearance of the truck the next day, it was not the Kenworth truck he had been shown during his preaward survey, but a smaller one without the capacity for carrying pipe, drilling mud and other equipment. He noted tha there was insufficient pipe at th site to comply with the 1,000 fee contract specified drilling capability. Appellant did not have the sub (threaded adaptors) to hook up th Government's core barrel or th customary float sub fitting jus above the drill bit. He noted th lack of spare parts and weldin equipment. The COR drove into a nearby community and rented the required subs, charging them to the Government's account. Appellant's testimony contradicts that of the COR respecting the availability of parts, including the subs. However, the testimony of an on-the-site observer of the work, witnessing the breakdowns, and attempted repairs, and the difficulties encountered in the work, must be given greater weight in this instance. Had the required equipment and spare parts been available at the site as claimed by appellant, there is little to account for only 9 hours of drilling and 6 hours of reaming during an 8-day period as shown on the logs.

By letter of Nov. 14, 1978 (AF-4), the contracting officer sent appellant a listing of equipment and personnel deficiencies and advised appellant that the deficiencies must be cured within 10 days, or the Government may terminate the contract for default under General Provision No. 11. A telephone record of a conversation between the contracting officer and Mr. Durkan dated December 1 (AF-10) indicated that Mr. Durkan acknowledged receipt of the "cure letter" on Nov. 24, 1978, and advised that he needed until December 5 to be ready to drill at the next site. By telegrams dated December 1 and December 4 (AF-11 and 12), the contracting officer directed appellant to mobilize at Potter Valley by 9 a.m. December 6 for drilling the next hole. He directed Mr. Durkan to have written evidence of ownership or management control of all equipment and materials necessary to perform in accordance with the contract.

The COR and contracting officer went to Potter Valley on the morning of December 6 and determined that appellant had not brought contract specified equipment to the site. The COR testified that the drilling rig with the 3½ inch pipe supplied had only 750 feet drilling capacity rather than the contract specified 1,000 feet. The water truck lacked the specified capacity and did not have a loading pump, pipe racks, or tank heater. Additionally, there was no high pressure air compressor or proper sized downhole hammer. The only hammer was 6½ inches in diameter which he advised would require more air and larger pipe (Tr. 34-37). The two Government representatives left the site to return to their motel accommodations. There, Mr. and Mrs. Durkan came to the room to advise that the critically needed air compressor was either on its way or already at the site (Mr. Durkan: Tr. 149). Mr. Keeton, an employee of appellant, confirmed by letter dated Dec. 13, 1978, that the equipment assembled at Potter Valley was about the same as they had at Boonville except that missing items included an air compressor, downhole hammer, fishing tools and subs (AF-20).

The contracting officer sent a telegram on Dec. 6, 1978, terminating appellant's right to continue performance for default, and a confirming termination letter was sent on Dec. 7, 1978. A "redi-letter" dated Jan. 26, 1979, from Mr. Durkan to the contracting officer advises that a necessary part of his drilling rig was delivered to him on Jan. 8, 1979, and that his equipment and 1,500 feet of drill pipe makes his plant job ready (GE–26).

The gravaman of appellant's arguments is that he was simply supplying equipment and personnel to drill holes for the Government under the contract, and the fact that the COR permitted him to start work drilling the first hole with equipment that did not meet the contract requirements constituted an acceptance of substitute equipment for that required in the contract.

Subsequent to the default termination, the Government did award a replacement contract to another contractor and according to the COR, had drilled over 100 holes by the time of the hearing, at a cost of approximately $45,000 more than the cost would have been under appellant's contract (Tr. 40). It is noted that this averages over 10 holes per month, which is a rate unlikely to be achieved with excessive downtime for repairs or waiting for the acquisition of needed spare parts or drilling rig components. No reprocurement costs have been assessed against appellant by the Government.

Findings

The issue presented in this case is whether the Government did accept the use of substitute equipment in lieu of that specified in the contract, and thereby improperly default terminate appellant's contract. Appellant relies primarily on the preaward survey by the COR and the use of his equipment at Boonville in an unsuccessful attempt to drill one hole with a target depth of 750 feet. He has not attempted to show that the equipment he supplied at the Boonville or Potter Valley sites was in compliance with the contract specifications, or that the complement of equipment was complete. The above specifications for the drilling equipment to be furnished establish the minimum performance standards for the specified equipment and the minimum accessories required to be furnished by the contractor. The depth of the holes to be drilled was specified to be up to 1,000 feet. Bidders on the contract are responsible for determining whether the equipment they have available to them will meet these minimum standards. There is nothing in the record to indicate that either the COR or the contracting officer ever indicated to appellant that equipment not meeting these standards would be acceptable for use on the contract. It is not disputed that the Kenworth water truck that the COR was shown during the preaward survey was not made available for use at either site, but that a smaller truck was furnished. Uncontroverted testimony of the COR establishes the fact that the drilling depth capability of equipment varies directly with the size of the hole and the amount of air supply, *i.e.*, the smaller the drill pipe and the greater the air supply, the greater the depth of drilling capability (Tr. 34–36). The contractor must be presumed to know the proper coordination of components of his drilling equipment to know whether he can achieve the contract requirements.

Inasmuch as the contract did not require success by appellant in drilling to the target depth at sites chosen by the Government, the failure of appellant to achieve the target depth is not relevant. However, to the extent that the operations at Boonville demonstrated that appellant's equipment was incomplete or failed to meet the minimal contract specifications, these operations are significant. On Nov. 8, 1978, appellant achieved 300 feet in 4 hours of continuous drilling. Thereafter, no significant amount of drilling was accomplished before an inadequate amount of water supply or a breakdown in equipment forced the shutdown of equipment. An inference may be drawn that if the water truck had had ample capacity and adequate equipment and spare parts been available, more continuous drilling would have been possible, thereby enhancing the probability that the target depth would have been reached.

Appellant's claim that the Government accepted the equipment that was admitted to be in noncompliance with the specifications in appellant's questioning of the COR (Tr. 173–75) is not supported by the evidence. By memorandum of Oct. 5, 1978, the COR pointed out the deficiencies of appellant's equipment, but concluded that it might be possible for appellant to provide sufficient equipment to meet the specifications (GE–25). The COR's daily record of events at the Boonville site reveal a continued concern expressed to appellant's personnel that a full complement of contract required equipment was not available (AF–5). By letter to the contracting officer dated Nov. 13, 1978, he detailed the specific failures to supply equipment meeting contract requirements and concluded, "Please note that Larry Durkan has repeatedly told me that he will have whatever is required—however he is long on promises and short on performance" (AF–3).

Therefore, contrary to the claim that the Government accepted the use of noncompliant equipment, the record shows continuous efforts by the Government to require compliant equipment to be supplied. These efforts were intensified when the experiences at Boonville demonstrated that appellant's equipment did not meet contract requirements. Absent a showing of a waiver of the contract specifications, the Government had a right to insist on full compliance with the contract specifications. This, it did by the "cure letter" dated Nov. 14, 1978, and the telegrams requiring appellant to mobilize at Potter Valley and to provide evidence that it owned or had management control of the specified equipment. Mr. Durkan's visit to the COR and contracting officer at the motel room after the appointed hour for mobilization at Potter Valley on Dec. 6, 1978, confirms that the critical component of a high pressure air compressor was not available at the site. Appellant's employee, Mr. Keeton, confirms that the equipment assembled at Potter Valley lacked the air compressor, downhole hammer, fishing tools, and subs. Lacking the critical components of the drilling rig of an air compressor and downhole hammer, appellant clearly failed to mobilize at Potter Valley the contract required equipment necessary to begin drilling operations. Consequently, we find that appellant was in default of the contract requirement to provide the specified equipment.

During the hearing on Sept. 10 and 11, 1979, in San Francisco, appellant requested a continuance until such time as he could have the case presented by legal counsel (Tr. 75). Ruling on the motion was deferred, and the hearing was concluded with Mr. Durkan representing appellant in accordance with his written notice to the Board dated May 22, 1979. The Board's rules, which were furnished appellant upon docketing of his appeal, do not require that appellant be represented by counsel. Rule 4.100(e)(4) requires the interpretation of our rules so as to secure a just and inexpensive determination of appeals without unnecessary delay. Hearing procedures are made as informal as possible in order that legal counsel is not essential if appellant desires to present his appeal without counsel. In this instance, with the concurrence of Government counsel, appellant was given every assistance by the hearing officer in the presentation of his case. Consultation between Mr. Durkan and his wife was permitted at every stage of the hearing to assure a fair and complete presentation of appellant's case. Mr. Durkan's presentation showed a full knowledge of the facts leading up to this appeal. He was provided with written notice of the hearing date, and took no exception. The parties assembled with their witnesses at the appointed time for hearing with the customary inconvenience and difficulties inherent in coordinating schedules and travel arrangements. The site of the hearing was chosen to afford appellant a minimum of expenditures to present his case. Appellant's only reason given for desiring not to proceed without an attorney was his perceived inadequacy to properly present his case. Under these circumstances, we find no basis for granting of the motion for a continuance, and adopt the transcript of the concluded hearing as the official record of the hearing. Mr. Durkan made his election to represent appellant many months before the hearing and failed to provide sufficient cause to permit a change in his decision after the hearing was proceeding.

At the hearing, Mr. Durkan repeatedly made reference to the claim that appellant should be paid for the work that it did at Boonville. The Government responded that an invoice for such work had been requested in order that the contracting officer could make a determination as to whether the Government had any liability to make any payments to appellant. The Government indicated that it had no knowledge of any demand for payment and appellant failed to produce any evidence of such a demand. No evidence was offered at the hearing respecting the basis of appellant's claim for payment or any justification for the total of $15,000 he claimed to be due. Our jurisdiction is appellate in nature, and there having been no claim presented to or decided by the contracting officer respecting money claimed to be due appellant, we find that the Board is without jurisdiction to consider any monetary claim under these appeals.

Conclusion

We have found that the termination for default of appellant's contract was proper because of the failure to provide the contract specified equipment; and therefore, the appeals are denied.

Russell C. Lynch
Administrative Judge

I concur:

G. Herbert Packwood
Administrative Judge

APPEALS OF YALE INDUSTRIAL TRUCKS, BALTIMORE/WASHINGTON, INC.

IBCA-1287-7-79 & IBCA-1293-8-79

Decided *September 12, 1980*

Contract No. 68-03-6064, Environmental Protection Agency.

Appeals denied.

1. Contracts: Disputes and Remedies: Termination for Default: Generally

The contracting officer's decision to terminate for default a fixed price contract for the delivery of a single forked lift truck for a stated price is deemed proper where the appellant failed to timely deliver the truck to the specified delivery point by the specified contract delivery date.

2. Contracts: Disputes and Remedies: Termination for Default: Excess Costs

Where the Government presented evidence of immediate need for replacement of a forked lift truck in need of repairs and presenting a safety hazard, the Government's action to reprocure the truck from the third lowest bidder who had the only immediately available truck complying with the contract standards is deemed proper and consistent with the duty to mitigate the reprocurement costs.

APPEARANCES: Paralee White, Attorney at Law, Cohen & White, Washington, D.C., for Appellant; Richard Anderson, Government Counsel, En-

vironmental Protection Agency, Cincinnati, Ohio, for the Government.

OPINION BY ADMINISTRATIVE JUDGE LYNCH

INTERIOR BOARD OF CONTRACT APPEALS

By this appeal, the appellant seeks to overturn the default termination of its contract for failure to make timely delivery of a forklift truck, and to avoid the payment of the assessment of excess reprocurement costs. The parties agreed on a lengthy stipulation of facts and there is little disagreement on the factual circumstances leading up to the Government's action to terminate the contract for default. Appellant contends that its interpretation of the contract delivery provision as meaning that delivery occurred upon delivery to the carrier should be accepted and that the Government erred in its reprocurement by failing to mitigate the excess costs.

Background

Appellant was the successful bidder on an invitation for bids for one electric forklift truck and was awarded a fixed-price contract on Feb. 22, 1979, for $18,258. The contract contained the following delivery requirements:

> 1. Delivery under any contract resulting from this Invitation/Proposal shall be made within sixty (60) days after receipt of award of contract. Accelerated delivery is acceptable to the Government at no additional cost.
>
> 2. Delivery shall be made F.O.B. Destination to the following facility:
>
> Environmental Protection Agency
> Motor Vehicle Emission Laboratory
> 2565 Plymouth Road
> Ann Arbor, MI 48105
>
> NOTE: The term "F.O.B. Destination to" means on board the conveyance of carrier free of expense to the Government at a specified delivery point where the consignee's facility is located. The term "facility", as used herein, means plant, warehouse, store, lot or other location to which shipment can be made.

Appellant received the contract on Feb. 26, 1979, which resulted in a scheduled delivery date of Apr. 27, 1979. On Apr. 24, 1979, the contracting officer called Mr. Walter Gruzs of Yale Industrial Trucks to determine the status of the truck and was advised that shipment would occur on Apr. 26 or 27. On Apr. 30, 1979, appellant's representative, Mr. Ostergard, called the contracting officer to advise that the shipment would be delayed because of a problem, but there was a chance that the truck could arrive at the destination of Ann Arbor, Michigan, that day or, in any event, by May 4. The Government's Ann Arbor facility received the truck battery on April 30 and the battery charger on May 3, 1979. These two items were list priced at approximately $4,500 and were included in the total contract price.

On May 16 the contracting officer telephoned Mr. Gruzs to advise that the failure to deliver the truck was a potential default termination situation and was told that the shipment had been misdirected by a computerized shipment procedure and that it was being tracked manually. On May 18, 1979, the contracting officer sent appellant a notice to show cause as to why the contract should not be terminated under the Termination for Default provision of the contract. Appellant received the show cause notice on or about May 21, and a representative sent a telegram on May 30 to the contracting officer advising that the shipment had been misdirected and was rescheduled for shipment between June 4 and June 11, 1979. On June 14, the contracting officer telephoned appellant to propose a revised delivery date of June 15 or appellant would risk termination. Appellant was unable to ship at this time because of a missing trail wheel, but after investigating this problem, Mr. Gruzs sent a telegram to the Government advising that the delivery date will be on or before June 25, 1979. On June 18 the contracting officer telephoned appellant to state that a modification would be issued pursuant to the telegram notification of delivery on or before June 25, 1979.

On June 18 the contracting officer contacted the second lowest bidder responding to the invitation for bids and concluded that the quoted delivery schedule of 60–90 days was not acceptable. On June 22, the contracting officer sent appellant a telegram stating that the contract would be terminated for default if complete delivery has not been made by 12:01 a.m. on June 26, 1979. The promised contract modification was dated June 18, 1979, and required that delivery shall be made no later than June 25, 1979.

On June 22, 1979, the contracting officer contacted the third lowest bidder responding to the invitation for bids which was Clarklift. He learned that Clarklift had the required truck, battery, and charger on hand and was willing to deliver at its quoted price of $20,923. On the same date, the contracting officer talked with the requiring facility in Ann Arbor to verify the continuing need for the truck and was requested to make an award to the next lowest bidder to avoid the time required for a new advertised procurement action.

Appellant shipped the forklift truck from Greenville, North Carolina, on June 24, 1979, and by telegram on June 25, advised the contracting officer of the delivery. On June 26 the contracting officer verified that the truck had not been received in Ann Arbor, and sent a telegram that afternoon notifying appellant that the contract was terminated for default for failure to deliver by June 25, 1979. Earlier that day, the contracting officer had received a telegram from Mr. Gruzs stating the truck had been shipped on June 24, 1979, and giving the model and serial number of the truck.

After sending the default notice to appellant, the contracting officer sent a telegram to Clarklift offering a contract for the forklift truck at its original bid price, which offer was accepted by telegram on June 27.

Appellant's forklift truck was received in Ann Arbor on July 6, 1979, and acceptance was refused. The Clarklift truck was received and accepted on July 13, 1979, and paid for by check on Aug. 8, 1979. Prior to receipt of either truck, appellant's representatives protested the default termination in telephone conversations and urged acceptance of appellant's previously shipped truck. The Government refused to reconsider the termination action or to accept appellant's truck. On July 23, 1979, the contracting officer notified appellant that the battery and battery charger would not be accepted and requested appellant to remove them from the Ann Arbor facility. By letter dated Aug. 16, 1979, the contracting officer assessed $2,665 in excess procurement costs against appellant and later increased the assessment by $91.29 to reflect the ½ percent increased prompt payment discount the Government would have been entitled to from appellant if it had paid appellant within 20 calendar days.

Discussion and Findings of Fact

Appellant contends that the contract term "delivery" was reasonably interpreted to mean delivery to the shipper, and that the default termination was improper because delivery to the shipper had occurred before the contract delivery date. At the hearing and in the briefs, appellant sought to show this interpretation of "delivery" to be the customary use in the trucking industry. Appellant contends that its communications with the contracting officer were all consistent with the interpretation that "delivery" occurred upon the date the forklift truck was given over to the shipper, and that the contracting officer accepted this interpretation by failure to object or to give a different interpretation to appellant.

Appellant's attempt to give a different meaning to the term "delivery" must fail because of the lack of ambiguity in the express contract terms defining "delivery" and "F.O.B. Destination to." The delivery provisions set forth above clearly provides that delivery shall be made F.O.B. destination at Ann Arbor, Michigan. Appellant incorrectly states the premise in its prehearing brief that no definition of delivery is included in the contract. Not only is the term "delivery" defined to be F.O.B. destination at Ann Arbor, Michigan, but also, the term "F.O.B. Destination to" is stated to mean "on board the conveyance of carrier free of expense to the Government *at a specified delivery point* where the consignee's facility is located." (Italics added.) Delivery was required to be made within 60 days at Ann Arbor, Michigan, according to the clear and unchallenged language of the contract. Appellant's arguments relating to its reasonable interpretation and the custom and usage in the trucking industry become relevant only upon a showing of an ambiguity in the contract language. The arguments are not made relevant by ignoring the provisions of paragraph 2 of the delivery provision stating where delivery is to be made.

The meaning of F.O.B. destination is a well established part of the law. The Uniform Commercial Code, Section 2–319 states:

> (1) Unless otherwise agreed the term F.O.B. (which means "free on board") at a named place, even though used only in connection with the stated price, is a delivery term under which
>
> * * * * *
>
> (b) when the term is F.O.B. the place of destination, the seller must at his own expense and risk transport the goods to that place and there tender delivery of them in the manner provided in this Article (Section 2–503).

Appellant does not and cannot contend that, in the face of the express language of the contract as to delivery, the forklift truck belonged to the Government at the time that it was delivered into the hands of the shipper. The carrier was the agent of the seller and the risk of loss or misdirection of the shipment falls on the seller or the shipper, not the Government. If delivery to the Government was completed upon delivery of the truck to the shipper by appellant, then the earlier shipment alleged to have been made in May would have completed appellant's obligations under the contract, even though the alleged shipment never arrived at Ann Arbor. Appellant's failure to rely on the May shipment and failure to recover the misdirected shipment and secure its proper delivery during the ensuing month before termination is not explained in the record. We find the contract language for delivery to be clear and unambiguous in requiring delivery to occur at Ann Arbor, Michigan, on or before June 25, 1979. The parties agree that the forklift truck was not delivered to Ann Arbor by that date. Appellant's failure to deliver on or before the fixed date in the contract permitted the Government to invoke its rights under the Termination for Default provision of the contract. Therefore, we find the action to terminate appellant's right to perform under the contract for default to be proper.

Appellant also contends that the reprocurement cost assessment is not reasonable because the Government (1) failed to consider appellant's lower priced, available unit as a source of supply, (2) failed to utilize items already at point of receipt in the reprocurement, (3) failed to elicit any competition in the reprocurement, and (4) failed to negotiate the price with the sole offeror.

The first contention that the Government failed to consider appellant's lower priced available unit in its reprocurement action appears specious under the facts of this case. According to the stipulated facts, there was no way the Government could be assured of the existence of an available unit from appellant at the time of reprocurement. As stated earlier, appellant informed the Government on Apr. 30, 1979, that despite a problem that existed there was a chance that the truck would arrive in Ann Arbor that same day, or in any event, by Friday, May 4. During the following month, it developed that the truck had been misdirected and never arrived at Ann Arbor. Therefore it appears that the contracting officer had no greater assurances that a forklift truck shipped by appellant in June would be received at the destination than he had, on prior assurances, that the truck would arrive by Friday, May 4. Essentially, the argument that the Government had a duty to mitigate damages by considering the purchase of appellant's forklift truck in transit would amount to a further extension of the contract performance period. (*See Si Lite, Inc.*, GSBCA No. 2442 (May 7, 1968), 68-1 BCA 7032.) Appellant cannot impute a duty for the Government to purchase its forklift truck on reprocurement in order to mitigate damages, especially under circumstances where the Government could not be certain of the current availability of the truck.

Appellant contends that the Government failed to mitigate the reprocurement cost assessment by utilizing the already delivered battery and battery charger, which were compatible with other manufacturer's forklift trucks according to testimony offered at the hearing. Appellant's witness, Mr. Gruzs, testified that appellant did not inform the Government prior to reprocurement that the battery and charger could be used with trucks of other manufacturers. The cases relied on by appellant in support of the contention that the Government should have utilized appellant's battery and charger to reduce reprocurement costs involved contracts for multiple numbers of identical deliverable items. Appellant's contract called for a single item at a single unit price. The forklift truck as described in the specifications required that a battery and charger be included, but there were no separate prices for these items. The delivery of portions of a single deliverable unit cannot be seen to transform the contract into one calling for multiple units, under which completed items may be required to be accepted at the contract price prior to reprocurement. No evidence was offered as to the ultimate disposition by appellant of the rejected forklift truck with its battery and charger, so that no determination can be made as to whether appellant suffered any actual damages despite the assessment of reprocurement costs. The forklift truck with battery and charger was essentially a standard commercial item, not manufactured especially for the Government to its specifications. With the stipulated facts showing circumstances that appellant had considerable difficulty in meeting its delivery commitments, a prompt resale of the rejected truck can be presumed.

Appellant argues that the failure of the Government to seek competition on the reprocurement contract shows a failure to demonstrate the reasonableness of its reprocurement action. No proof was offered to show that competition would likely result in a lower price than was paid in the Government's reprocurement action. The contracting officer testified that he had confirmed the continued and pressing need for the new forklift truck (Tr. 73–74). He verified that the using facility was concerned about the safety of the truck being replaced, that it needed repairs and that the unreliability of the existing equipment resulted in manually loading or unloading of materials. In *Century Tool Co., Inc.*, GSBCA No. 3999 (Mar. 3, 1976), 76–1 BCA 11,850, on which appellant relies to show that the Government has the burden of showing the reprocurement was reasonable, the Board accepted the ample precedent that this burden is lighter when a critical, verifiable need for the items in question is present. In that case, the facts did not support such a determination, but here the Government has provided evidence that added cost of repairs, a safety hazard, and manual effort would be involved during any period of readvertising and award of a reprocurement contract. Under these circumstances, we find the Government's action to award the reprocurement contract to the third lowest bidder on the original competitive procurement to be reasonable, because of the immediate availability of a forklift truck meeting the contract specifications.

Finally, appellant contends that the Government's failure to negotiate the price to be paid to the reprocurement contractor was unreasonable. Citing *The Lutz Co.*, GSBCA No. 2173 (Dec. 15, 1967), 68–1 BCA 6762, appellant urges that the Government should have sought an even lower price on the reprocurement contract by negotiating with Clarklift. *The Lutz Co.* case involved the Government's election to seek a reprocurement source by negotiated procurement methods and the acceptance of the lowest bid without further negotiations. The case is distinguishable from the instant case in that *The Lutz Co.* case would require the Government to be bound by the election to resort to a negotiated reprocurement by endeavoring to negotiate an even lower price with the low bidder, whereas, in the instant case, the Government had not made the election to reprocure by negotiation. Rather, the firm bid of the only bidder with available equipment was selected from the original advertised competition. The Government was given 2-working days by Clarklift to procure at the original bid price or to abandon the right to reprocure at the original bid price. The bid of Clarklift was a competitive bid under the original advertised procurement, and the award was made on the same basis as the original award to appellant, *i.e.*, to the lowest responsible and responsive bidder. Just as negotiation would have been inappropriate with appellant after it won the initial competition, Clarklift had no obligation to enter negotiations with the Government to lower its bid price.

The brief acceptance period allowed by Clarklift between June 22 and June 26 for acceptance of Clarklift's original bid does not indicate that a Government election to negotiate would have resulted in anything other than a higher price.

Having found that appellant's claims that the Government failed to mitigate damages are without merit, we find that the Government did take reasonable steps to mitigate the reprocurement costs.

Conclusion

We find that appellant was in default in the failure to deliver by the time specified in the contract, rendering the Government's action to terminate its right to proceed to be proper. Also, we find that the Government's reprocurement action was justified under the circumstances and that such action accorded with the duty to mitigate reprocurement costs. Therefore, the appeals are denied.

Russell C. Lynch
Administrative Judge

I concur:

William F. McGraw
Chief Administrative Judge

HAYDEN & HAYDEN COAL CO.

2 IBSMA 238

Decided *September 12, 1980*

Appeal by the Office of Surface Mining Reclamation and Enforcement from a Mar. 27, 1980, order of Administrative Law Judge Joseph E. McGuire denying a motion to reconsider that part of his Feb. 19, 1980, decision vacating violation No. 1 of Cessation Order No. 79-2-72-1 (Docket No. NXO-2-R).

Reversed.

1. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Findings—Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally

When a cessation order indicates that it is being issued both because the condition, practice, or violation is causing or can reasonably be expected to cause significant, imminent environmental harm and because there has been a failure to abate a violation listed in a notice of violation, a finding of either of those grounds is sufficient to sustain the cessation order.

APPEARANCES: Carol S. Nickle, Esq., Office of the Field Solicitor, Knoxville, Tennessee; Walton D. Morris, Jr., Esq., and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Division of Surface Mining, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

Background

On Aug. 29, 1979, an inspector with the Office of Surface Mining Reclamation and Enforcement (OSM) conducted an inspection of the George's Branch surface mine of Hayden & Hayden Coal Co. (Hayden) in Breathitt County, Kentucky, pursuant to the Surface Mining Control and Reclamation Act of 1977 (Act).[1] He issued Notice of Violation No. 79–2–72–1 charging seven violations of the Act and initial program regulations. Hayden filed an application for review of the notice and an application for temporary relief. Subsequently, the inspector returned to the minesite on Oct. 11, 1979, and issued Cessation Order No. 79–2–72–1 for failure to abate the violations listed in the notice.

Following a hearing on Oct. 25, 1979, the Administrative Law Judge issued a decision on Feb. 15, 1980. He affirmed violation Nos. 1–7 of the notice, and affirmed the cessation order as it related to violation Nos. 2–7, but vacated the order as it applied to violation No. 1.[2]

On Mar. 14, 1980, OSM filed a motion with the Administrative Law Judge seeking reconsideration of his disposition of violation No. 1. He denied the motion by order dated Mar. 27, 1980. OSM filed a timely notice of appeal from that order and filed a brief in support of its appeal. Hayden did not file a brief.

Discussion

The Administrative Law Judge based his denial of OSM's motion to reconsider on OSM's failure to prove that violation No. 1 of the cessation order caused or could reasonably be expected to cause significant, imminent environmental harm. The cessation order in this case contained the following language on page 2 (Exh. R–18):

> *Check Appropriate Box:*
>
> ☐ The condition, practice or violation is creating an imminent danger to the health or safety of the public.
>
> ☐ The condition, practice, or violation is causing or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources.
>
> ☐ The permittee or operator has failed to abate violation(s) No. *1 through 7* included in Notice of Violation No. *79–2–72–1* * * * within the time for abatement originally fixed or subsequently extended.

The inspector checked both the second and third boxes. The Administrative Law Judge stated in his Mar. 27, 1980, order: "Once having advised applicant of the grounds upon which the cessation order was being issued [by checking the boxes], even if the inspector inadvertently checked the second box, basic fairness compels that the respondent be required to adduce evidence in support of both bases in order to prevail."

OSM argues that the Administrative Laws Judge erred in that determination. It explains that the inspector checked the second box because violation Nos. 2–7 of the notice were causing or could be expected to cause significant, imminent environmental harm. The third box was checked because none of the seven violations had been abated. However, that interpretation was not clear from the face of the cessation order. The inspector could have entered a short explanatory statement on the cessation order. He did not. Despite the lack of explanation, Hayden did not object to—nor was it prejudiced by—the checking of the two boxes.

---

[1] Act of Aug. 3, 1977, 91 Stat. 445, 30 U.S.C. §§ 1201–1328 (Supp. I 1977).

[2] Violation No. 1 of Notice of Violation No 79–2–72–1 charged a "[f]ailure to have signs identifying the mine area displayed at all points of access to the permit area from public roads and highways" in violation of 30 CFR 715.12(b).

[1] While the inspector admitted that violation No. 1 was not causing nor was it expected to cause significant, imminent environmental harm (Tr. 74), the record supports a finding that violation No. 1 was not abated at the time the cessation order was issued (Tr. 49). That finding alone is sufficient to sustain the issuance of a cessation order as it relates to violation No. 1. 30 U.S.C. § 1271(a)(3) (Supp. I 1977); 30 CFR 722.13. The Administrative Law Judge erred in ruling that OSM had to prove both significant, imminent environmental harm and a failure to abate in order to prevail. Proof of either of those grounds would support the issuance of a cessation order.

Basic fairness did not require that OSM prove both grounds in this case in order to have the cessation order sustained, but merely required that those violations that were contested and for which there was competent evidence be upheld. Therefore, the lack of evidence to support a finding of significant, imminent environmental harm did not serve to relieve Hayden from its proven failure to abate violation No. 1.

Violation No. 1 of Notice of Violation No. 79-2-72-1 was not abated on Oct. 11, 1979, and Cessation Order No. 79-2-72-1, as it related to that violation, was properly issued. The order appealed from is reversed.

Newton Frishberg
Administrative Judge

Melvin J. Mirkin
Administrative Judge

Will A. Irwin
Chief Administrative Judge

CRAVAT COAL CO., INC.

2 IBSMA 249

Decided *September 23, 1980*

Consolidated appeals by Cravat Coal Co., Inc., from the decisions of Administrative Law Judge Sheldon L. Shepherd upholding violation No. 2 of Cessation Order No. C 79-3-13-2 (Docket No. IN 0-7-R, Jan. 25, 1980) and granting temporary relief from prepayment of a civil penalty assessment (Docket No. IN 0-16-P, Feb. 21, 1980).

IBSMA 80-30 (Docket No. IN 0-7-R) affirmed; IBSMA 80-35 (Docket No. IN 0-16-P) reversed and remanded.

1. Surface Mining Control and Reclamation Act of 1977: Previously Mined Lands: Generally—Surface Mining Control and Reclamation Act of 1977: Water Quality Standards and Effluent Limitations: Discharges from Disturbed Areas

All surface water drainage from the area disturbed by surface mining and reclamation operations must comply with the effluent limitations of 30 CFR 715.17(a) even if it originates as contaminated ground water from previously mined areas.

2. Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Generally—Surface Mining Control and Reclamation Act of 1977: Temporary Relief: Generally

43 CFR 4.1260 does not authorize temporary relief from the requirement of 43 CFR 4.1152(b) that a proposed civil penalty be paid into escrow pending a final determination on the merits of the case.

3. Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Generally

30 CFR 723.14(a) does not authorize an Administrative Law Judge to reduce the number of days for which a civil penalty may be assessed when the obligation to abate the violation has not been suspended.

APPEARANCES: Paul F. Benson, Esq., Cadiz, Ohio, for Cravat Coal Co., Inc.; John C. McDowell, Esq., Myra P. Spicker, Esq., Office of the Field Solicitor, Indianapolis, Indiana, Walton D. Morris, Esq., and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Division of Surface Mining, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

Factual and Procedural Background

Roger Dolzani, an authorized representative of the Secretary of the Interior, inspected Cravat Coal Co., Inc.'s (Cravat's) mine in Tuscarawas County, Ohio, on Sept. 6, 1979, in accordance with the surface Mining Control and Reclamation Act of 1977 (Act)[1] and 30 CFR 721.11. He noticed water seeping from the highwall north of the minesite entrance, just inside the disturbed area. A field test of this water below the mine's eastern permit boundary showed it did not conform to the effluent limitations set forth in 30 CFR 715.17(a).[2] The inspector therefore issued Notice of Violation No. 79–III–13–6.[3] Violation No. 2 of this notice of violation stated that the "discharge from the area disturbed * * * fails to meet the effluent limitations" and that the remedial action required was to "treat the water from the seep so that the discharge from the permit area meets the effluent limits of sect. 715.17(a)."[4] The abatement period was set for Oct. 1, 1979; later it was extended four times to Dec. 5, 1979, the maximum period allowed under sec. 521(a)(3) of the Act.[5] On Dec. 6, 1979, Cessation Order No. 79–3–13–2 was issued for failure to abate the violations cited in the original notice of violation.[6]

---

[1] Act of Aug. 3, 1977, 91 Stat. 445, 30 U.S.C. §§ 1201–1328 (Supp. I 1977).

[2] The field tests showed a pH of 5 and iron at more than 10 mg/1 (Resp. Exh. 3). Subsequent laboratory analyses resulted in readings of 3.04 pH and 148 mg/1 iron (Resp. Exhs. 4 and 5). The effluent limitations in 30 CFR 715.17(a) require pH to be within the range of 6.0–9.0 and fix 7 mg/1 as the maximum allowable total iron.

[3] Violation No. 1 of Notice of Violation No. 79–III–13–6 was issued for "failure to direct all surface drainage from the disturbed [sic] through sediment ponds before leaving the permit area. The permittee has removed the sediment pond before water quality and revegetation requirements have been met."

[4] Violation No. 2 of the original notice of violation was modified to include another seep discovered later "just north of and adjacent to the minesite entrance in the Portion to Which the Notice Applies (violation #2)" (Resp. Exh. 7, p. 4).

Cravat filed an application for review of violation No. 2 of the cessation order on Jan. 7, 1980.[7] It filed an application for temporary relief on January 10. A hearing was held in Pittsburgh on both applications on Jan. 22, 1980, and a decision was issued on Jan. 25, 1980. Cravat filed a notice of appeal from this decision with the Board on Feb. 26, 1980,[8] and a brief on Mar. 28, 1980.

Meanwhile, on Feb. 11, 1980, Cravat filed an "application" for review of a proposed civil penalty assessment of $22,500 it received for the cessation order on Jan. 11, 1980, and an application for temporary relief from the requirement[9] that full payment of the proposed assessment be placed in escrow pending final determination of the assessment. These applications were also consolidated for purpose of a decision issued Feb. 21, 1980. Cravat filed a "notice of appeal of civil penalty" from this decision with the Board on Mar. 12, 1980, and a memorandum in support of its appeal on Mar. 24, 1980. The Board treated this "notice" as a petition for discretionary review in accordance with 43 CFR 4.1270, and granted the petition on Apr. 9, 1980.[10]

---

[5] 30 U.S.C. 1271(a)(3) (Supp. I 1977). These extensions were all granted in order to give Cravat more time to get State of Ohio approval for a modified drainage plan (Tr. 30). Representatives of Cravat and Ohio disagreed on where a new sedimentation pond should be located. (*See* n. 3, *supra.*) In mid-October Ohio indicated informally it would not approve Cravat's suggested location; this indication was repeated in mid-November (Tr. 68). In late November, after learning from the OSM inspector that the period for abatement in the NOV could not be extended beyond 90 days, Cravat submitted a proposed modification of its permit to Ohio which incorporated Cravat's preferred location for the sedimentation pond, and proceeded to implement that proposal (Tr. 31, 68, 76, 77). Cravat learned at the January 22 hearing that its proposed modification had not been approved (Tr. 46).

[6] Violation No. 2 of the cessation order listed the "seep about 100 ft. north of minesite entrance" and the "seep adjacent to and north of the minesite entrance" as operations to be ceased immediately (Resp. Exh. 9).

When the OSM inspector returned on Dec. 6, 1979, he found that the drainage from the seep had been directed via a ditch to an existing sedimentation pond but that "[t]he discharge from that pond and off the minesite or off the permit area, both were still failing the effluent limitations" (Tr. 31). The seep drainage cited in the notice of violation field tested at pH 3.20, iron 10 mg +/1 (Resp. Exh. 7, p. 2). A sample of this drainage was taken from the same place as on Sept. 6 (Tr. 33). Laboratory analysis of this sample showed pH 3.35, iron 185 mg/1 (Resp. Exh. 8; Tr. 35).

The inspector therefore listed, as violation No. 2 of the cessation order, failure to abate violation No. 2 of Notice of Violation No. 79–III–13–6 and described as "operations" to be ceased immediately: "Discharge off the permit area of water coming from the disturbed area that is not within the effluent limits of sec. 715.17(a): (1) seep about 100 ft. north of minesite entrance; (2) seep adjacent to and north of the minesite entrance." (*See* n. 4, *supra.*) As affirmative obligations the inspector wrote: "Install, operate, and maintain treatment facilities so that all surface drainage from the disturbed area meets the effluent limits of sec. 715.17(a) before leaving the permit area."

Because "[a]pproximately 2 acres of drainage area in the north portion of the permit still would not be passed through the existing pond, since the ditch [was] not extended that far" (Resp. Exh. 7, p. 3), the inspector included violation No. 1 in the cessation order for failure to abate violation No. 1 of the notice of violation. (*See* n. 3, *supra.*)

[7] Cravat's application for review stated that violation No. 1 of the cessation order, issued for failure to abate violation No. 1 of the notice of violation, had been vacated by OSM.

[8] The appeal was docketed as IBSMA 80–30.

[9] 43 CFR 4.1152(b)(1).

[10] This petition was docketed as IBSMA 80–35.

On Apr. 11, 1980, the Office of Surface Mining Reclamation and Enforcement (OSM) filed a motion requesting that the Board consolidate Cravat's two appeals and permit OSM to file a joint brief. The Board granted this motion on Apr. 14, 1980. OSM filed its brief on May 28, 1980.

Discussion and Conclusions

[1] In his Jan. 25, 1980, decision the Administrative Law Judge concluded that although the water which created the condition that was the basis for violation No. 2 originated as contaminated ground water from previously mined areas it was surface water drainage from a disturbed area [11] that must comply with the effluent limitations of 30 CFR 715.17(a).[12] This conclusion is in accordance with the regulations. As the Administrative Law Judge noted, the definition of surface water [13] does not distinguish between sources of water. And 30 CFR 715.17(a) provides: "*All* surface drainage from the disturbed area, including disturbed areas that have been graded, seeded, or planted, shall be passed through a sedimentation pond * * * before leaving the permit area. Sedimentation ponds shall be retained until drainage from the disturbed area has met the water quality requirements of this section." (Italics added.) It provides further: "*Discharges from areas disturbed* by surface coal mining and reclamation operations *must meet* * * * the following numerical effluent limitations." (Italics added.) Passing all surface drainage from a disturbed area through a sedimentation pond is the means required to achieve compliance with the requirement that discharges from a disturbed area must meet the effluent limitations. These limitations apply to all discharges from a disturbed area, irrespective of source, whether or not they have been passed through a sedimentation pond or series of sedimentation ponds. Cravat did not treat the water flowing from the seep on its disturbed area to comply with the water quality requirements of sec. 715.17(a) before it left the permit area.[14] Accordingly, we affirm the Administrative Law Judge's Jan. 25, 1980, decision.[15]

---

[11] Tr. 13–14, 38–39, 43–45.

[12] "I, therefore, conclude that the water in question was surface drainage which was discharged from an area disturbed by surface coal mining and reclamation operations and that the same exceeded the effluent limitations in both total iron and pH limitations. I further find that violation No. 2 of Notice of Violation No. 79–III–13–6 was properly issued. Pursuant to the provisions of Section 521(a)(3) of the Act. Cessation Order No. 79–3–13–2 was properly issued inasmuch as the notice of violation had not been abated within the 90-day maximum permitted by the statute and regulations." Jan. 25, 1980, decision in IN 0–7–R, at 3.

[13] "Surface water means water, either flowing or standing, *on the surface of the earth.*" (Italics added.) 30 CFR 710.5. This definition remained unchanged after comments on the proposed initial program regulations. *See* 42 FR 44928 (Sept. 7, 1977); 42 FR 62641, comment 3 (Dec. 13, 1977).

[14] *See* nn. 2 and 6, *supra.*

[15] It is possible that the U.S District Court for the District of Columbia, in accordance with a remand in *In Re: Surface Mining Regulation Litigation*, Nos. 78–2190, 78–2191, and 78–2192 (D.C. Cir. May 2, 1980), may hold that the Department must amend 30 CFR 715.17(a)

(Continued)

This application of sec. 715.17(a) is consistent with the preamble and introductory paragraph to sec. 715.17. The objective of the water quality and other requirements of 30 CFR 715.17 stated in the preamble "is to have the permittee research and understand the hydrologic balance in the affected area as well as to understand the effect of mining on that balance so that operations are planned and conducted to minimize disturbances both on- and off-site."[16] Specifically, "the permittee must plan operations to control ground water quality and flow."[17] The introductory paragraph to 30 CFR 715.17 requires a permittee to "plan and conduct coal mining and reclamation operations to minimize disturbance to the prevailing hydrologic balance in order to prevent long-term adverse changes in the hydrologic balance that could result from surface coal mining and reclamation operations, both on- and off-site." The definition of hydrologic balance in 30 CFR 710.5, as well as the introductory paragraph to sec. 715.17, make it clear that water quality is one of the factors a permittee must take into account in planning and conducting the operation and reclamation.

Cravat neither planned its operations to control ground water quality nor conducted its operations so as to minimize water pollution. It knew the area where it proposed to conduct surface mining operations had been previously deep mined.[18] It knew about the specific seep that was later cited in the notice of violation before it began its operations and knew that it was part of the hydrologic system of the area.[19] It did not do anything about the seep because it felt it was not responsible for it;[20] rather, it followed the coal seam that was the course of the seep as it conducted its operations.[21]

We cannot approve the Feb. 21, 1980, decision excusing prepayment of and reducing the proposed civil penalty based on Cravat's violation of 30 CFR 715.17(a), however. In that decision the Administrative Law Judge wrote at page 3:

> This case arose under the enforcement provisions of Section 521 of the Act. Temporary relief was sought under Section 525 of the Act which permits the Secretary to "grant temporary relief from any notice or order issued under section 521 of this title." And application for temporary relief from payment into escrow of the sum of $22,500 would also seem to be within the scope of 43 CFR 4.1260 * * *. The cases cited by the respondent are distinguishable (*Blackhawk Mining Co., Inc.*, 1 IBSMA 215 * * * which cited *C & K Coal Co.*, 1 IBSMA 118 * * *). Neither of those

---

(Continued)
to include variances contained in regulations promulgated by the U.S. Environmental Protestion Agency under the Federal Water Pollution Control Act Amendments of 1972, Oct. 18, 1972, 86 Stat. 816, 844, *as amended* by the Clean Water Act of 1977, Dec. 27, 1977, 91 Stat. 1566, 1582–86, 1590, 33 U.S.C. § 1311 (Supp. I 1977). In this case, however, we may apply 30 CFR 715.17(a) as it reads now and read at the time of the enforcement action under review.

[16] 42 FR 62649 (Dec. 13, 1977).

[17] *Id.*

[18] Tr. 64, 66–67.

[19] Tr. 81–82.

[20] Tr. 74.

[21] Tr. 82–83.

cases involved an application for temporary relief, and neither involved an unreasonable delay by a third party which contributed to the failure to abate.

[2] We hold that 43 CFR 4.1260 does not authorize temporary relief from the requirement of 43 CFR 4.1152(b) that a proposed civil penalty be paid into escrow pending a final determination on the merits of the case. 43 CFR 4.1260 states specifically that "[t]hese regulations contain the procedures for seeking temporary relief in section 525 review proceedings under the Act." Sec. 525(c) authorizes temporary relief, under limited conditions, "from any notice or order issued under section 521 of this title." Civil penalties, however, are imposed under sec. 518 of the Act, and that section provides for their administrative review. Neither that section nor any provision of the regulations provides for temporary relief from the prepayment requirement of sec. 518(c), implemented in 43 CFR 4.1152(b)(1).

In his Feb. 21, 1980, decision the Administrative Law Judge also reduced the number of days for which a civil penalty could be assessed from 46 to 16 and accordingly reduced the proposed civil penalty to $12,000. He did so on the basis of the provision in 30 CFR 723.14 that assessment of the mandatory civil penalty of $750 for each day an unabated violation continues after a cessation order has been issued "shall not be made for any period that the obligation to abate *is* suspended." (Italics added.) "[I]t would seem intolerable," he wrote, "to penalize the petitioner for delays occasioned by a co-enforcer of the regulations, that is, the State of Ohio * * *. I, therefore, find that the duty to abate *should have been* suspended for the days *from mid-October 1979 to mid-November 1979* which was apparently wasted by the State of Ohio." [22] (Italics added.)

[3] There are at least two problems with this reasoning. First, under 30 CFR 723.14(a) a mandatory civil penalty is assessed—as it was in this case—for the period a violation "remains unabated *following expiration of the abatement period* in the notice of violation" (italics added), not a period before that expiration date (*e.g.*, mid-October to mid-November). It is improper to subtract pre-expiration days from the postexpiration period. Second, although it may be unfortunate or even poor judgment that the duty to abate was not suspended by OSM, it in fact was not suspended. Nor is it necessary for OSM to do so. The fact that the State of Ohio did not tell Cravat what would be acceptable to it [23] does not relieve Cravat of its obligation to comply with what is required by a Federal notice of violation or cessation order. *Kaiser Steel Corp.*, 2 IBSMA 158, 162, 87

---

[22] Feb. 21, 1980, decision in IN 0-16-P, at 3.

[23] We note that Cravat did not formally seek a permit modification from Ohio until late November and that Ohio had twice before then indicated its probable position on the proposed modification. (*See* n. 5, *supra*.)

I.D. 324, 326 (1980); *Little Sandy Coal Sales*, 2 IBSMA 25, 30, 87 I.D. 61, 64 (1980); *Eastover Mining Co.*, 2 IBSMA 5, 8, 87 I.D. 9, 11 (1980); *Cedar Coal Co.*, 1 IBSMA 145, 153, 86 I.D. 250, 255 (1979). It was therefore inappropriate under 30 CFR 723.14(a) for the Administrative Law Judge to reduce the number of days for which a civil penalty could be assessed from 46 to 16 for the reasons he did.

However, the regulations governing civil penalties during the initial program have since been amended, among other things, to limit the number of days for which a $750-day penalty may be assessed for failure to abate a violation to 30.[24] Accordingly, we must remand this case for a determination of what civil penalty is appropriate under these amended regulations.

We reverse the order in the Administrative Law Judge's Feb. 21, 1980, decision granting temporary relief from prepayment of the civil penalty and reducing the number of days for which a civil penalty may be assessed to 16.

The decision in IN 0-7-R is affirmed; the decision in IN 0-16-P is reversed and remanded for a determination of the appropriate civil penalty.

WILL A. IRWIN
Chief Administrative Judge

NEWTON FRISHBERG
Administrative Judge

---

[24] 30 CFR 723.15(b)(2), 45 FR 58780, 58784 (Sept. 4, 1980).

APPEAL OF PAUG-VIK, INC., LTD.

5 ANCAB 59

Decided *September 24, 1980*

Motion for reconsideration of an order of the Alaska Native Claims Appeal Board dated May 1, 1980, granted.

Order affirmed in part and modified.

1. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Jurisdiction—Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Remand

Where a matter on appeal has been remanded to the Bureau of Land Management for a specific determination, the Board retains jurisdiction over the question of whether or not such a determination has been rendered moot by subsequent actions of the party.

2. Alaska Native Claims Settlement Act: Administrative Procedure: Generally—Alaska Native Claims Settlement Act: Definitions: Federal Installation

An agreement between selecting Native corporations and a Federal agency, on lands actually used by the Federal agency, cannot be enforced in lieu of a § 3(e) determination by the Bureau of Land Management to compel conveyance to the Native corporations in accord with the agreement. ANCSA by clear language in § 3(e) mandates a Secretarial determination. While the Secretary may delegate, he may not be compelled to relinquish his statutory duty to third parties.

3. Alaska Native Claims Settlement Act: Administrative Procedure: Generally—Alaska Native Claims Settlement

Act: Definitions: Federal Installation

Where the required § 3(e) determination is crucial to conveyance, where the affected Federal agency and all affected Native corporations agree on the identification of lands actually used by the agency, where the record discloses no inconsistency between the agreement and § 3(e), where the determination has already been delayed for a significant period of time by the lack of implementing regulations and the date of publication of final regulations cannot be ascertained, the Bureau of Land Management may make a § 3(e) determination, relying on the parties' agreement for factual data, in the absence of final regulatory guidelines.

APPEARANCES: John A. Smith, Esq., and Robert Spitzfaden, Esq., Smith & Gruening, for Paug-Vik, Inc., Ltd.; Martha Mills, Esq., Office of the Attorney General, for the State of Alaska; Major Gordon Wilder, Esq., Hq. 21 ABG/JA, for the United States Air Force; John M. Allen, Esq., Office of the Regional Solicitor, for the Bureau of Land Management; Donald Boberick, Esq., Office of the Regional Counsel, for the Federal Aviation Administration; Elizabeth Johnston, Esq., and Thomas S. Gingras, Esq., for Bristol Bay Native Corporation; Harland W. Davis, Esq., for Bristol Bay Borough; George G. Moen, for the U.S. Army Corps of Engineers.

OPINION BY ALASKA NATIVE CLAIMS APPEAL BOARD

PROCEDURAL BACKGROUND

In a decision of July 5, 1978, *Appeal of Paug-Vik, Inc., Ltd.*, 3 ANCAB 49, 85 I.D. 229 (1978) [VLS 77-2], the Board remanded this appeal to the Bureau of Land Management (BLM) for a determination pursuant to § 3(e) of the Alaska Native Claims Settlement Act (ANCSA) (43 U.S.C. § 1602 (e) (1976)), whether the lands in dispute were within the smallest practicable tract enclosing land actually used in connection with the administration of a Federal installation; *i.e.*, the Air Force.

On Sept. 18, 1979, the BLM published proposed rulemaking setting forth procedures to be used in implementing § 3(e) of ANCSA (44 FR 54254, Sept. 18, 1979). This rulemaking sets guidelines for the type of determination for which the Board has remanded this appeal to the BLM. Final rulemaking will be the first promulgated on § 3(e) determinations under ANCSA; no other such rulemaking exists. Comments were required to be submitted by Nov. 19, 1979. As of the present date, final rulemaking has not been published in the *Federal Register* and the date of such publication is unknown.

On Apr. 11, 1980, the Appellant, Paug-Vik, Inc., Ltd. (hereinafter Paug-Vik), filed with the Board an agreement between Paug-Vik, the United States Air Force, and Bristol Bay Native Corp., which purports to be a negotiated resolution of the § 3(e) determination for which the Board had remanded the appeal to the BLM. The agreement describes certain lands as the smallest practicable tracts enclosing lands actually used in connection with the administration of the Air Force installation at King Salmon. The agreement also recites certain understandings with regard to highway rights-of-way in the State of Alaska, access to gravel pits outside the "smallest practicable tract" by the Air Force, distribution of monies paid into escrow by various parties as payment for gravel extraction and liability for use of an ordnance disposal site.

Paug-Vik moved the Board for an order conveying title to the surface estate of the lands which are the subject of the agreement. The Board on May 1, 1980, denied Paug-Vik's motion on the grounds that BLM had not made a § 3(e) determination and an order to convey would be premature. Paug-Vik requested reconsideration.

Paug-Vik asserts that all issues as to title to the lands in dispute have been settled by their § 3(e) agreement. Paug-Vik seeks an order compelling BLM to convey the surface estate to them, and the subsurface to Bristol Bay Native Corp., in those lands not described in the agreement as actually used by the Air Force.

BLM objects on the grounds that the Board lacks jurisdiction because the appeal is currently on remand to them for a § 3(e) determination; BLM is not a party to the agreement and the agreement cannot be substituted for a Secretarial determination pursuant to § 3(e); and, until regulations implementing § 3(e) have been published in final form, BLM cannot make such a determination.

The issues raised are: Where an agreement, between a Federal agency using lands and Native corporations with ANCSA selection rights, purports to determine which lands are "actually used" by the agency within the meaning of § 3(e) of ANCSA, is BLM precluded from adopting the determination set forth in the agreement, in lieu of an independent BLM determination? Second, where proposed regulations implementing § 3(e) of ANCSA have been published for comment, is BLM precluded from making § 3(e) determinations, by any method, pending publication of final rulemaking?

The Board concludes that BLM is not precluded from accepting the § 3(e) determination set forth in the agreement, and may do so prior to publication of final regulations.

DISCUSSION

The lands from which Native corporations may select are public lands as this term is specially defined in ANCSA.

Sec. 3(e) of ANCSA defines public lands for purposes of the Act:

> "Public lands" means all Federal lands and interests therein located in Alaska except: (1) the smallest practicable tract, as determined by the Secretary, enclosing land actually used in connection with the administration of any Federal installation.

As the Board noted in *Appeal of Seldovia Native Association, Inc.*, 1 ANCAB 65, 78, 83 I.D. 461 (1976) [VLS 75-3]:

> **Generally, the term "public lands" is used to describe such lands as are subject to sale or other disposal under general law. *Newhall* v. *Sanger*, 92 U.S. 761 (1875). The term refers to the general public domain, unappropriated land, land belonging to the United States which is subject to sale or other disposal under the general land laws and not reserved or held back for any special governmental or public purpose. *Ben J. Boschetto*, 21 IBLA 193 (1975). It does not include lands to which rights have attached and become vested through full compliance with applicable land laws. *Holz* v. *Lyles*, 280 Ala. 321, 195 So. 2d 897 (1967). It is however, a term of varying senses, depending largely on the context in which it appears and the special circumstances of the case. *Kindred* v. *Union Pacific Railroad Co.*, 225 U.S. 582 (1912).**

83 I.D. 461, 467–468.

The definition of public lands contained in § 3(e) is broader and more inclusive than the generally accepted meanings referenced above, for it is not limited to unappropriated land which is subject to disposal under the general land laws and which is not reserved for governmental or other public purposes.

The definition in § 3(e) encompasses lands which are *not* subject to disposal under the general land laws, because they *are* reserved for government use. The expanded definition in § 3(e) makes reserved Federal land "public land" and therefore available for Native selection if not being actually used by a Federal agency. This broad definition in § 3(e) operates only to make land available for conveyance to Native corporations under ANCSA; it does not operate to make lands available for disposal under the general public land laws.

The Act does not specify procedures to be followed in making § 3(e) determinations. As noted, procedural regulations have not been published.

Paug-Vik argues that the Air Force, Bristol Bay Native Corp., and itself, being the using agency, Native regional corporation, and selecting Native village corporation, are the only possible grantees of the land in question and therefore the only possible parties with an interest in the § 3(e) determination addressed by their agreement; since they are in agreement on lands actually used by the Air Force, further determination by the Secretary is unnecessary. Therefore, it is Paug-Vik's position that the Board should accept the agreement in lieu of a § 3(e) determination, thereby eliminating the need for a remand, and order BLM to convey according to the terms of the agreement.

BLM, on the other hand, argues first that the Board lacks jurisdiction to consider this issue, because the appeal is presently on remand to BLM for a § 3(e) determination. Even if the Board had jurisdiction, BLM cannot make a § 3(e) determination in the period between publication of proposed and final rulemaking on procedures for § 3(e) determinations.

The Board cannot accept the

positions of either Paug-Vik or BLM.

[1] First, the Board has jurisdiction. Where a matter on appeal has been remanded to BLM for a specific determination, the Board necessarily retains jurisdiction over the question of whether or not such a determination has been rendered moot by subsequent actions of the parties.

Following BLM's approach, the Board would lose all control over an appeal until BLM acted on a remand. Theoretically, even if the parties advised the Board that they had settled the issue on remand, the Board would lack jurisdiction to dismiss the appeal. Such a result would be impracticable. While the Board would not attempt to substitute its judgment for BLM's on a matter remanded to BLM for findings, the Board clearly retains jurisdiction to rule on the question presented by Paug-Vik; *i.e.*, whether the parties have, by agreement, settled all disputed § 3(e) issues so that a § 3(e) determination by BLM is superfluous.

[2] Second, the agreement between Paug-Vik, Bristol Bay Regional Corp., and the Air Force cannot be enforced in lieu of a § 3(e) determination by BLM to compel conveyance to Paug-Vik in accord with the agreement. ANCSA by clear language in § 3(e) mandates a Secretarial determination. While the Secretary may delegate, as he has to BLM, he may not be compelled to relinquish his statutory duty to third parties.

Third, the Board finds no authority for the proposition that BLM may not make a § 3(e) determination in this appeal in the interim between publication of proposed regulations and final adoption of rulemaking. BLM cited no authority. Judicial interpretations of rulemaking requirements illustrate only the general rules of law relevant to this issue.

In general, agencies must have standards—for reasons of fairness, to encourage the security of transactions, and to maintain the independence of the agencies. *City of Lawrence, Mass.* v. *CAB*, 343 F.2d 583, 587 (1st Cir. 1965).

Agencies may, by statute, be given the power to make rules. "As a matter of law, it is not necessary for Congress to formulate each rule and regulation in an area of highly technical activities. These duties and responsibilities are placed upon administrative agencies competent to administer in the public interest within their respective spheres of operation." *United States* v. *Clayton*, 198 F. Supp. 18, 21 (W. D. La. 1961). *See also United States* v. *Grimaud*, 220 U.S. 506, 31 S. Ct. 480, 483, 55 L. Ed. 563 (1911).

Rules with substantial impact on those regulated, such that they change existing rights and obligations, are subject to the rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. § 553 (1976); *Dimaren* v. *Immigration and Naturalization Service*, 398 F. Supp. 556, 559 (S.D.N.Y. 1974). Where rules are subject to the Administrative Procedure Act, *supra*, then such regulations are void unless published in strict conformity with the Act. *Kelly* v. *U.S. Department of the Interior*, 339 F. Supp. 1095, 1101 (E.D. Calif. 1972).

Rulemaking requirements of the Administrative Procedure Act, *supra*, may not be avoided by making rules in the course of adjudicative proceedings. *NLRB* v. *Wyman-Gordon Co.*, 89 S. Ct. 1426, 1429, 394 U.S. 759, 22 L. Ed. 709 (1969).

However, administrative matters are committed to agency discretion. The choice between rulemaking and individual ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency. *NLRB* v. *Q-T Shoe Manufacturing Co.*, 409 F.2d 1247, 1252 (3d Cir. 1969).

None of these rulings are directly in point. BLM does not seek to avoid rulemaking or to circumvent proper rulemaking procedures. The precise issue raised by this appeal is whether, upon publication of proposed rulemaking, an agency is precluded from acting on a matter potentially affected by such rulemaking, until the regulations become final. Having published § 3(e) regulations for comment, must BLM refrain from making any determinations pursuant to § 3(e) until the final regulations are published—no matter how long this may take?

The Board thinks not.

In general, it is a prudent and reasonable policy to await publication of implementing regulations before attempting to make determinations required by ANCSA. However, several factors in this appeal outweigh that consideration.

ANCSA does not expressly mandate rulemaking; sec. 25 of the Act authorizes the Secretary to publish regulations as necessary. (43 U.S.C. § 1624 (1976).) The fact that the Secretary has not yet issued final regulations establishing procedures for § 3(e) determinations cannot be taken as a prohibition against action under that section.

Sec. 3(e) raises a threshold question in the administration of ANCSA, because it addresses the question of whether certain lands—those claimed to be actually used in connection with the administration of a Federal agency—are public lands within the unique definition of ANCSA, and therefore available for Native selection. To fulfill the statutory mandate of prompt conveyance in ANCSA, it seems imperative to make § 3(e) determinations in a timely manner. Nine years have elapsed since enactment of ANCSA, and § 3(e) regulations have not been published.

The only determination required is whether the lands in question are being "actually used" by a Federal agency—here, the Air Force—or whether the lands are "public lands" as defined in ANCSA and therefore available for Native selection. The Air Force and the only other potential grantees of the land—the selecting Native village and regional corporations—are in agreement on which lands are being "actually used." The appeal record indicates that the Air Force position has been approved by James F. Boatwright, Principal Deputy Assistant Secretary of the Air Force, Installations.

While BLM cannot be required to accept the parties' agreement on § 3(e) issues as the Secretary's determination, the agreement nonetheless is worthy of serious consideration by BLM as a source of information. Although the Air Force must justify its need for land, BLM obviously cannot determine which lands this agency, or any agency, actually uses without consulting it. Another probable source of information would be the selecting Native corporation, which could be expected to present objections, together with supporting data, if it disagreed with the agency's claimed use. The only beneficiary of a § 3(e) determination as contemplated by ANCSA must be a selecting Native corporation; as previously noted, § 3(e) determination as contemplated by ANCSA must be a selecting Native corporation; as previously noted, § 3(e) does not operate to release lands from use by Federal agencies and make them available for disposal under the general public land laws. The using agency and the affected Native corporations appear to be the only possible interested parties. Where they all agree on which lands the agency uses, BLM should be able to place strong reliance on their conclusions.

[3] Under these circumstances, where the required § 3(e) determination is crucial to conveyance, where the affected Federal agency and all affected Native corporations agree on the identification of lands actually used by the agency, where the record discloses no inconsistency between the agreement and § 3(e), where the determination has already been delayed for a significant period of time by the lack of implementing regulations and the date of publication of final regulations cannot be ascertained, the Board sees no reason why BLM should not make a § 3(e) determination, relying on the parties' agreement for factual data, in the absence of final regulatory guidelines.

The Interior Board of Land Appeals (IBLA) has held that BLM should suspend action on applications for disclaimers of interest under sec. 315 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1745 (1976), where no regulations had been issued. *Grace Cooley Coleman, Leota Ferrell*, 35 IBLA 236 (1978). This case is distinguishable from the present appeal. In *Coleman*, two applicants had filed for disclaimers of interest by the United States in land which both applicants claimed, as a means of removing a cloud on the title, under § 315 of FLPMA. No regulations had been issued to implement this section. The Director of BLM instructed the New Mexico State Director not to process the Coleman application until regulations were issued. Based on a legal opinion that title to the land was still in the

ited States, the State Director
ned decisions returning both ap-
cations. Thus, BLM acted
inst express instructions and the
ion taken had the effect of an ad-
lication rejecting the applicants'
npeting title claims, without op-
rtunity for the applicants to
esent their cases fully, and with-
t regulatory guidelines.

Finding that the disclaimer
ould not be processed until regu-
ions had been formulated, IBLA
ted, "It is possible that regula-
ns when issued will specify the
pe of showings an applicant is to
ke to help the Department in
king its title determination, and
ll prescribe the fact-finding and
view procedures and standards."
leman, supra, at 239.

The Board agrees with *Coleman*
at an agency may not deny an ap-
lication or adjudicate conflicting
aims of title without regulations.
owever, in the present appeal,
LM is not asked to adjudicate con-
icting interests. All the parties
ave agreed among themselves on
e question of which lands were
ctually used by the Air Force with-
the meaning of § 3(e), and have
dvised BLM of their agreement.

Further, in the present appeal,
he record discloses no instructions
o BLM against § 3(e) determina-
ions before rulemaking; indeed,
BLM realty personnel were appar-
ntly working on a § 3(e) determi-
ation and agreed to postpone it,
ot for regulations but for negotia-
ion of the agreement between the
parties. (Memorandum of Mical E. Walker, Exhibit A, Paug-Vik Memorandum in Support of Motion for Reconsideration, June 3, 1980.)

BLM has filed a copy of a letter to Morris Thompson, President of the Alaska Federation of Natives, from the Solicitor, Leo Krulitz, acting for the Secretary. (BLM Brief, June 13, 1980.) The letter responds to a request by Mr. Thompson that "no binding actions which have a negative effect on Native land rights under Section 3(e) of the Alaska Native Claims Settlement Act should take place until final regulations on this issue have been promulgated." Mr. Krulitz replies that proposed regulations are being drafted and states, "With respect to your specific concerns, we do not intend to make any section 3(e) determinations prior to the issuance of final regulations."

There is no indication that this letter was communicated to BLM as an instruction, or published in any manner as Departmental policy. In any case, the specific concerns addressed—the possibility of actions with negative effect on Native land rights under § 3(e)—are not present in this appeal, where the affected Native corporations are the parties seeking a § 3(e) determination. Under these circumstances, the Board does not believe *Coleman* to be applicable.

The appellant has argued that BLM is estopped, by the representations of its realty specialist Mical Walker, from maintaining that a § 3(e) determination must await final § 3(e) regulations. Since the

Board here rejects BLM's position and finds that BLM may make a § 3(e) determination of lands involved in this appeal without awaiting final regulations, it is not necessary to reach the estoppel issue.

On reconsideration, the Board's order of May 1, 1980, which found that it would be premature to order BLM to convey lands without a § 3(e) determination, is affirmed. The Board further rules that BLM is not precluded from making a § 3(e) determination in this appeal before publication of final rulemaking on procedures for making § 3(e) determinations.

Judith M. Brady
Chief Administrative Judge

CAPITOL FUELS, INC.

2 IBSMA 261

Decided *September 24, 1980*

Appeal by Capitol Fuels, Inc., from that part of the Jan. 22, 1980, decision of Administrative Law Judge Tom M. Allen upholding the violations of 30 CFR 715.12(b) and (e) alleged in Notices of Violation Nos. 79-I-86-9 and 79-I-86-11 and the violation of 30 CFR 715.17(a) alleged in Notice of Violation No. 79-I-86-19 (Docket No. CH 9-174-R).

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Inspections: Generally

An OSM inspector who, after a reasonably diligent search, does not find a mine employee with some degree of management or supervisory authority and who is not asked for identification by other employees, may conduct an inspection without the prior presentation of credentials.

2. Surface Mining Control and Reclamation Act of 1977: Initial Regulatory Program: Generally

Sec. 521(a)(1) of the Act does not have effect during the initial regulatory program.

3. Surface Mining Control and Reclamation Act of 1977: Signs and Markers: Generally

Mine identification and blasting signs must be located as required by 30 CFR 715.12(b) and (e).

APPEARANCES: Thomas H. Vanderford IV, Esq., Pauley, Curry & Thaxton, Charleston, West Virginia, for Capitol Fuels, Inc.; Harold Chambers, Esq., Office of the Field Solicitor, Charleston, West Virginia, Mark Squillace, Esq., and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

This appeal was filed by Capitol Fuels, Inc. (Capitol), on Feb. 19, 1980, from that part of a decision of the Hearings Division issued on Jan. 22, 1980, in Docket No. CH 9-174-R,[1] which upheld the violations f 30 CFR 715.12 (b) and (e) de- cribed in Notices of Violation Nos. 9–I–86–9 and 79–I–86–11, and the iolation of 30 CFR 715.17(a) de- cribed in Notice of Violation No. 9–I–86–19. For the reasons dis- ussed below, we affirm that deci- ion.

---

[1] An appeal filed by the Office of Surface Mining Reclamation and Enforcement was dismissed as not timely filed in accordance with 43 CFR 4.1271(b). *Capitol Fuels, Inc.* v. *OSM*, 2 IBSMA 43 (1980).

Factual and Procedural Background

On July 11, 1979, two inspectors rom the Office of Surface Mining eclamation and Enforcement OSM) visited three adjacent sur- ace coal mining and reclamation perations conducted by Capitol in oone County, West Virginia, nder State permits Nos. 56–72, 167–4, and 221–76. This inspection was nade pursuant to the Surface Min- ng Control and Reclamation Act of 977 (Act).[2] The inspectors first vent to the mine office common to he three operations, which they ound to be closed. Next they went o the maintenance shop, where they sked several maintenance employ- es for the mine superintendent or a oreman. They were told that the uperintendent was on vacation and hat one or more of the foreman vere somewhere on the minesites.

The inspectors then proceeded to nspect Capitol's operations and ound several conditions that they letermined were violations of the epartment's initial program regu- ations. Near the end of the inspec- ion, one inspector encountered apitol's maintenance foreman, identified himself, and stated the purpose of his visit. The inspector then accompanied the former on a tour of the minesites to observe, generally, the violations previously found.

On July 12, 1979, OSM served Capitol with Notices of Violation Nos. 79–I–86–9, 79–I–86–10, and 79–I–86–11.[3] After laboratory analysis of a water sample taken during the July 11 inspection, Notice of Violation No. 79–I–86–19 was served on Capitol on July 19, 1979.[4]

Capitol applied to the Hearings Division on Aug. 3, 1979, for review of the notices. Following the Nov. 9, 1979, hearing, both parties submitted briefs to the Administrative Law Judge. Capitol argued that all of the notices should be vacated either because the inspectors failed to present their credentials prior to the inspection, in violation of 30

---

[2] Act of Aug. 3, 1977, 91 Stat. 445, 30 U.S.C. § 1201–1328 (Supp. I 1977).

[3] Notice of Violation No. 79–I–86–9, violations Nos. 1 and 2, stated (concerning permit No. 221–76):

"The person has failed to display at all points of access to the mine or permit area from public roads and highways, signs identifying the mine area [in violation of 30 CFR 715.12(b)].

* * * * * * *

"The person has failed to display signs or markers for 'blasting' at the edges of immediate blasting areas, or along access roads [in violation of 30 CFR 715.12(e)]."

These descriptions of violations appear, with insignificant differences in wording, in Notice of Violation No. 79–I–86–11 (concerning permit No. 56–72).

[4] A violation of 30 CFR 715.17(a) is described in this notice:

"Discharge from areas disturbed by surface mining and reclamation activities exceed the maximum allowable numerical limitations for suspended solids and iron. Qualified laboratory analysis indicates 536 mg/1 suspended solids and 12.33 mg/1 iron. The maximum allowable suspended solids is 70 mg/1 and 7 mg/1 iron."

The notice pertains to operations pursuant to State permit No. 221–76.

CFR 721.12(a), or because they failed to notify the State regulatory authority of their findings, in violation of sec. 521(a)(1) of the Act, 30 U.S.C. § 1271(a)(1) (Supp. I 1977). Capitol further argued that the signs required by 30 CFR 715.12 (b) and (e) were present at the time of the inspection; that the signs were located against fuel tanks approximately 100 feet from a common access road to the mining operations, due to construction where Capitol's access road and the public road intersected; and that no blasting signs were needed at the time of OSM's inspection because Capitol was not then blasting. Finally, Capitol argued that the drainage alleged to be in violation of 30 CFR 715.17(a) emanated from an abandoned deep mine and began before Capitol's operations.

The Administrative Law Judge held that "[a]lthough there may have been a technical violation of 30 CFR 721.12(a), which I do not concede, the second inspection cured the defect and there is absolutely no showing that the applicant was prejudiced by the actions of the inspector." Decision at 5. Capitol's argument based on sec. 521(a)(1) of the Act was dismissed as without merit on the basis of *Dayton Mining Co., Inc., & Plateau Mining, Inc.*, 1 IBSMA 125, 86 I.D. 241 (1979). *Id.* at 11. The Administrative Law Judge also found that "there was no evidence as to when the signs were removed or how long they had been removed [from the intersection of Capitol's access road and the public road] in order for the undersigned to determine that the signs were removed for a purely short temporary period," and, accordingly, held that "[t]he failure of [Capitol] to reset the signs further back in an area undisturbed by construction must be considered as a willful act * * * thereby causing a violation of 30 CFR 715.12 (b)." *Id.* at 6. The alleged violation of 30 CFR 715.17(a) was upheld on the authority of *Thunderbird Coal Corp.*, 1 IBSMA 85, 86 I.D. 38 (1979). *Id.* at 8-9.

Discussion and Conclusions

30 CFR 721.12(a) provides that "[a]uthorized representatives of the Secretary, without advance notice and upon presentation of appropriate credentials and without a search warrant, shall have the right of entry to, upon, or through any surface coal mining and reclamation operations or any premises in which any records required to be maintained are located." [5] In *Consolidation Coal Co.*, 1 IBSMA 273, 86 I.D. 523 (1979), *after remand*, 2 IBSMA 21, 87 I.D. 59 (1980), the Board discussed this requirement. In the first decision we stated:

> [A]n OSM inspector [need not] wait patiently at the perimeter of the permit area until an operator asks him for his credentials. [An inspector] may proceed to the minesite office or to the first available person on the minesite. * * * Presentation of credentials at the earliest practical opportunity and whenever re-

---

[5] This regulation correlates with sec. 517(b)(3) of the Act, 30 U.S.C. § 1267(b)(3) (Supp. I 1977).

> quested to do so after each entry facilitates [the safe and orderly operation of mines] and does not impose undue burdens on OSM's inspection program.

1 IBSMA at 276–77, 86 I.D. at 525 (1979).

[1] The OSM inspectors conducted a reasonably diligent search for a Capitol official before beginning their inspection of the mining operations. Upon entering the permit areas, they first went to the mine office and found it closed. They then went to the maintenance shop where they encountered maintenance crewmen but no Capitol employee who appeared to have general management or supervisory responsibilities or who asked them to identify themselves.

The inspectors' determination to proceed with the inspection before finding a Capitol employee whose responsibilities might reasonably be taken to include overseeing their inspection activities was consistent with the provisions of 30 CFR 715.12(a). Inspectors should seek a person with some degree of management or supervisory responsibility. In this case the inspectors identified themselves to such an employee at the first practical opportunity.[6] Moreover, they accompanied him on a second inspection, thus giving him an opportunity to see the areas where violations were found by the inspectors. Under these circumstances, the Board agrees with the ruling below that Capitol was not prejudiced by the inspection procedure followed.

[2] The Board also agrees with the Administrative Law Judge that the failure of the inspectors to notify the State regulatory authority of their findings in accordance with sec. 521(a)(1) of the Act[7] is controlled by *Dayton Mining Co., Inc., & Plateau, Inc., supra.* We held in that case that sec. 521(a)(1) does not have effect during the initial regulatory program. Capitol has not presented us with any reason to reconsider this decision and we decline to do so. *See Kaiser Steel Corp.*, 1 IBSMA 184 (1979); 2 IBSMA 158, 87 I.D. 324 (1980).

[3] The record further shows that Capitol failed to maintain mine identification and blasting signs as required by 30 CFR 715.12(b) and (e) at its mining operations.[8] Although Capitol offered testimony that these signs were located ap-

---

[6] We do not suggest that an OSM inspector may refuse to present credentials to other mine employees who might request them. An inspector's obligation under 30 CFR 715.12(a), however, is first to seek a mine employee with some management or supervisory authority.

[7] Sec. 512(a)(1) provides in pertinent part:

"Whenever, on the basis of any information available to him, including receipt of information from any person, the Secretary has reason to believe that any person is in violation of any requirement of this Act or any permit condition required by this Act, the Secretary shall notify the State regulatory authority, if one exists, in the State in which such violation exists."

Codified at 30 U.S.C. § 1271(a)(1) (Supp. I 1977).

[8] 30 CFR 715.12(b) provides, in pertinent part, that "[s]igns identifying the mine area shall be displayed *at all points of access to the permit area from public roads and highways.*" (Italics added.) 30 CFR 715.12(e) provides, in pertinent part, that "[s]igns reading 'Blasting Area' and explaining the blasting warning and all-clear signals *shall be posted at all entrances to the permit area.*" (Italics added.)

proximately 50 feet to the side of the access road to one of the permit areas,[9] that testimony was not responsive to OSM's charge that the signs were not located at the point of access to the two permit areas identified in Notices of Violation Nos. 79–I–86–9 and 79–I–86–11, as required by the regulations.[10] Moreover, Capitol's testimony was insufficient to rebut the fair inference from OSM's testimony that whatever signs may have existed on the date of inspection were not easily seen from this access road.[11]

Capitol's contention that it was not blasting at the time of OSM's inspection does not alter our conclusions above. Blasting signs serve to warn the public of continuing, not necessarily constant, blasting activities. While Capitol may not have been blasting during OSM's inspection, there is no evidence that Capitol had permanently discontinued blasting.

Although Capitol also appealed the Administrative Law Judge's ruling upholding a violation of the effluent limitations of 30 CFR 715.17(a), it presented no argument against that ruling. We see no reason to disturb the decision below on this issue. *See Cravat Coal Co., Inc.*, 2 IBSMA 249, 87 I.D. 416 (1980).

For the foregoing reasons that part of the Jan. 22, 1980, decision appealed from is affirmed.

WILL A. IRWIN
Chief Administrative Judge

MELVIN J. MIRKIN
Administrative Judge

NEWTON FRISHBERG
Administrative Judge

HARDLY ABLE COAL CO.

2 IBSMA 270

Decided *September 24, 1980*

Appeal by Hardly Able Coal Co. from a Feb. 8, 1980, decision by Administrative Law Judge David Torbett in Docket No. NX 9–60–R, sustaining Cessation Order No. 79–II–5–14 issued for failure to abate a notice of violation issued for mining within 100 feet of a public road.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally

Violations of sec. 522(e) of the Act may be the subject of notices of violation under 30 CFR 722.12.

2. Surface Mining Control and Reclamation Act of 1977: Abatement: Remedial Actions—Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Remedial Actions—Surface Mining Control and Reclama-

---

[9] Tr. at 185, 187. The access road along which Capitol claims it had temporarily positioned its signs led to the mine operation under permit No. 221–76 (the subject of Notice of Violation No. 79–I–86–9).

[10] Nor did Capitol claim that there were mine identification or blasting signs for the operations under permit No. 56–72 (the subject of Notice of Violation No. 79–I–86–11) located along the access road to that permit area. *See* Tr. at 187–88.

[11] Tr. at 88–89, 95–96, 107.

tion Act of 1977: Variances and Exemptions: Generally

When a permittee does not have approval from the regulatory authority for an exemption from the requirements of the Act at the time of an OSM inspection, the inspector may properly require remedial action of a reclamation nature in a notice of violation.

APPEARANCES: Roger W. Ayers, for Hardly Able Coal Co.; Charles P. Gault, Esq., Office of the Field Solicitor, Knoxville, Tennessee; Walton D. Morris, Jr., Esq., and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

On Jan. 11, 1979, inspectors from the Office of Surface Mining Reclamation and Enforcement (OSM) visited the site of Hardly Able Coal Co.'s (Hardly Able) Wildcat Branch coal mine in Clay County, Kentucky. OSM issued to Hardly Able Notice of Violation No. 79–II–5–3, listing eight alleged violations of the Surface Mining Control and Reclamation Act of 1977 (Act)[1] and its implementing regulations, and Cessation Order No. 79–II–5–4, alleging one violation. During a follow-up inspection conducted on May 22, 1980, Hardly Able was issued Cessation Order No. 79–II–5–14 for failure to abate one of the violations listed in the notice, mining within 100 feet of a public road in violation of sec. 522(e)(4) of the Act (30 U.S.C. § 1272(e)(4) (Supp. I 1977)). Only this second cessation order is at issue in this appeal. Because we agree with the Administrative Law Judge's determination that this cessation order was properly issued, we affirm that decision.

Background

Hardly Able began operations at this site in February 1978 under a deep mine license from the Commonwealth of Kentucky. In August 1978 Kentucky issued Hardly Able a temporary authorization for surface disturbance related to a deep mine. This temporary authorization permitted the company to mine pending the issuance of a deep mining permit. Operations at the mine, however, were suspended in midsummer 1978 and had not been resumed at the time of the hearing.

The notice of violation issued to Hardly Able on Jan. 11, 1979, required the company to reclaim the area within 100 feet of the road. Cessation Order No. 79–II–5–14 for failure to abate was issued on May 22, 1979, and on May 30, 1979, Hardly Able requested a minesite hearing on that cessation order. On June 6, 1979, Hardly Able filed a letter with the Hearings Division that was treated as an application for review of the cessation order. At the minesite hearing, held on June 18, 1979, Hardly Able informed OSM that it intended to seek a waiver of the 100-foot provision from the regulatory authority as permitted by sec. 522(e)(4) (30 U.S.C. § 1272(e)(4) (Supp. I 1977)).[2] On July 24, 1979, Hardly Able filed its application for a deep mine permit with the Commonwealth. The Administrative Law Judge held a hearing on Sept. 17, 1979, and issued a decision on Feb. 8, 1980, finding that the cessation order was properly issued. Kentucky granted Hardly Able a mining permit on or about Sept. 21, 1979, after the administrative hearing was held, but before the decision was issued. This permit allowed Hardly Able to mine within 100 feet of the road.

---

[1] Act of Aug. 3, 1977, 91 Stat. 445, 30 U.S.C. §§ 1201–1328 (Supp. I 1977).

Hardly Able appealed the decision below on Feb. 29, 1980. Both parties submitted briefs. Both parties also responded to the Board's July 25, 1980, order requesting briefs on the applicability of *Eastover Mining Co.*, 2 IBSMA 70, 87 I.D. 172 (1980), to this case.

Discussion and Conclusions

[1] As an initial matter, the situation in this case is different from that in *Eastover, supra*. Unlike *Eastover*, there are no express statutory judicial remedies provided for the violation of the Act involved here. Also unlike *Eastover*, the Act expressly and specifically prohibits the activity for which the notice of violation was issued here. Further, the proscriptions of sec. 522(e) of the Act, made applicable during the initial program by 30 CFR 710.4, are clearly in the nature of performance standards. Such was not the case in *Eastover*. Violations of sec. 522(e) can therefore be the subject of notices of violation under 30 CFR 722.12 under the rationale in *Eastover*.

As for the enforcement action under review in this case, Hardly Able does not contest the validity of the initial notice of violation. Instead, Hardly Able argues that OSM did not require the proper remedial action and that therefore the company should not have received a cessation order for failing to abate in the manner prescribed in the notice. Hardly Able suggests that the notice should have been modified to list obtaining regulatory authority approval for mining within 100 feet of a public road as an appropriate alternative abatement.

Hardly Able did not seek review of the notice of violation, nor is there any evidence in the record that it sought a modification of the notice in order to change the required abatement to allow the company to obtain regulatory authority approval to mine within 100 feet of the road. The record indicates that Hardly Able did not inform OSM that it was seeking an exemption from the regulatory authority until the minesite hearing, approximately

---

[2] Hardly Able had begun the process of obtaining a waiver on Mar. 15, 1979, when it published notice of its intention to mine within 100 feet of a public road in a local newspaper in accordance with Kentucky law.

1 month after the cessation order was issued. The company had ample opportunity before the cessation order was issued to discuss the violation with OSM and to seek a modification of the required remedial action.

[2] The Board agrees with the conclusion reached below:

> The Act contemplates that a miner obtain permission from the regulatory authority to mine within 100 feet of a public road before the mining takes place. The ex post facto approval by the regulatory authority of mining within 100 feet of a county road generally defeats the purpose of the Act, that is, giving interested parties notice allowing them to protest before the actual mining takes place. To terminate a violation of this type by ex post facto approval of the regulatory authority would be the exception rather than the rule. Thus, the normal application of the Act would be for the inspector to require remedial action of a reclamation nature. In addition, the inspector has no particular reason to believe that the Applicant could obtain the required approval. Under all the facts and circumstances of the case, it is apparent that Inspector Shadoan ordered the proper remedial action.

Decision at 3. This conclusion conforms with the Board's decision in *Alabama By-Products Corp.*, 1 IBSMA 239, 246, 86 I.D. 446, 449 (1979), that regulatory authority approval of an exemption under the Act or regulations must be obtained prior to the start of any action to which the exemption applies.[3]

Because the notice of violation required the proper remedial action and because that action was not taken within the time given for abatement, Cessation Order No. 79-II-5-14 was properly issued for failure to abate that violation. The Hearings Division's decision of Feb. 8, 1980, is therefore affirmed. OSM's motion for oral argument is denied.

WILL A. IRWIN
Chief Administrative Judge

NEWTON FRISHBERG
Administrative Judge

BLACK FOX MINING & DEVELOPMENT CORP.

2 IBSMA 277

Decided *September 24, 1980*

Appeal by Black Fox Mining & Development Corp. from a May 6, 1980, decision by Administrative Law Judge Sheldon L. Shepherd sustaining Notice of Violation No. 79-I-50-51 which charged a violation of 30 CFR 715.17(a) for failure to pass all surface drainage from a tipple operation through a sedimentation pond (Docket No. CH 0-50-R).

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Words and Phrases

"Permit area." During the initial regulatory program, when a facility otherwise included within the meaning of "surface coal mining operations" is not specifically covered by a permit, the "permit area" is at least coextensive with the disturbed area.

---

[3] Thus the fact that approval was eventually received does not excuse the initial violation.

2. Surface Mining Control and Reclamation Act of 1977: Water Quality Standards and Effluent Limitations: Discharges from Disturbed Areas—Surface Mining Control and Reclamation Act of 1977: Water Quality Standards and Effluent Limitations: Sedimentation Ponds

A violation of 30 CFR 715.17(a) for failure to pass surface drainage through a sedimentation pond may be established for a surface coal mining operation that is not required by a state to have a permit by showing that there is surface drainage, that it does not pass through a sedimentation pond, and that it leaves the disturbed area.

APPEARANCES: Leo M. Stepanian, Esq., Brydon, Stepanian & Muscatello, Butler, Pennsylvania, for Black Fox Mining & Development Corp.; William Larkin, Esq., Office of the Field Solicitor, Charleston, West Virginia, Lynn Cox, Esq., and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Office of the Solicitor, Division of Surface Mining, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

Background

On Nov. 13, 1979, pursuant to the Surface Mining Control and Reclamation Act of 1977 (Act),[1] an inspector from the Office of Surface Mining Reclamation and Enforcement (OSM) inspected a tipple operation in Butler County, Pennsylvania, owned by Black Fox Mining & Development Corp. (Black Fox). He issued Notice of Violation No. 79–I–50–51, which charged Black Fox with failing "to pass all surface drainage from the disturbed area through a sedimentation pond or series of sedimentation ponds prior to leaving the disturbed area" in violation of 30 CFR 715.17(a). On Nov. 23, 1979, Black Fox filed an application for review of the notice. Following a hearing held on Mar. 4, 1980, a decision was issued on May 6, 1980, sustaining the notice of violation. Black Fox filed a timely appeal and both parties have filed briefs.

Discussion

[1] On appeal Black Fox argues that the notice did not properly charge a violation of 30 CFR 715.17 (a) because the OSM inspector used the words "disturbed area" and the regulation relates only to "permit area."[2] OSM states that because the Commonwealth of Pennsylvania does not require tipple operations to have permits, the inspector used "disturbed area" rather than "permit area."[3] We find that a violation was properly charged. In *Bethle-*

---

[1] Act of Aug. 3, 1977, 91 Stat. 445, 30 U.S.C. §§ 1201–1328 (Supp. I 1977).

[2] 30 CFR 715.17(a) reads in pertinent part: "All surface drainage from the disturbed area, including disturbed areas that have been graded, seeded, or planted, shall be passed through a sedimentation pond or a series of sedimentation ponds before leaving the permit area."

[3] Black Fox does not dispute OSM's jurisdiction of its tipple operation.

hem Mines Corp., 2 IBSMA 215, 220, 87 I.D. 380, 383 (1980), involving a surface drainage violation at a rail loading facility in Butler County, Pennsylvania, we stated:

> **The notice issued to Bethlehem stated that discharges were not passing through a pond before leaving the "disturbed area." During the initial regulatory program, when a facility otherwise included within the meaning of "surface coal mining operations" is not specifically covered by a permit, the "permit area" is at least coextensive with the disturbed area.**

That holding is dispositive of this issue in this case.

[2] Black Fox also contends that even if a violation were properly charged, OSM failed to prove a violation because it did not show that surface drainage left the permit area. To establish a violation of 30 CFR 715.17(a) on a surface coal mining operation that is not required by a state to have a permit, OSM must show that there is surface drainage, that it does not pass through a sedimentation pond, and that the drainage leaves the disturbed area. OSM established through testimony and photographic evidence that there was surface drainage leaving the disturbed area that did not pass through a sedimentation pond.[4] Black Fox did not rebut this evidence.

The decision appealed from is affirmed.

Melvin J. Mirkin
Administrative Judge

Will A. Irwin
Chief Administrative Judge

Newton Frishberg
Administrative Judge

ROBERTS BROTHERS COAL CO., INC.

2 IBSMA 284

Decided *September 26, 1980*

Appeal by Roberts Brothers Coal Co., Inc., from a Nov. 19, 1979, decision by Administrative Law Judge William J. Truswell in Docket Nos. NX 9-20-R and NX 9-34-P upholding a notice of violation issued by the Office of Surface Mining Reclamation and Enforcement for an alleged violation of the sedimentation control requirements of 30 CFR 715.17(a) and reducing the resulting civil penalty.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Tipples and Processing Plants: At or Near a Minesite—Surface Mining Control and Reclamation Act of 1977: Tipples and Processing Plants: In Connection With—Surface Mining Control and Reclamation Act of 1977: Words and Phrases

"*Surface Coal Mining Operation.*" A tipple located 200–300 feet from a minesite is a "surface coal mining operation" with-

---

[4] While there was some evidence that low-lying areas acted as natural sedimentation ponds (Exh. S-9; Tr. 33), the OSM inspector testified that there were no actual sedimentation ponds on the disturbed area and that over 50 percent of the drainage leaving the disturbed area did not pass through any of the low areas (Tr. 32).

in the meaning of 30 CFR 700.5 when the tipple processes and stores all of the coal extracted from that mine, the mine is owned by the owners of the corporation owning the tipple, and the mine was leased in order to supply coal to the tipple.

2. Surface Mining Control and Reclamation Act of 1977: Evidence: Generally

It is not error for an Administrative Law Judge to rely on hearsay evidence of chain of custody when the permittee challenges that evidence only by asserting that it is hearsay.

APPEARANCES: William D. Donan, Esq., Donan & Hunt, Madisonville, Kentucky, for Roberts Brothers Coal Co., Inc.; John P. Williams, Esq., Office of the Field Solicitor, Knoxville, Tennessee, and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

Factual and Procedural Background

On Oct. 27, 1978, while traveling along the access road to the Hopkins County, Kentucky, surface mine of Orbit Mining Co. (Orbit), Office of Surface Mining Reclamation and Enforcement (OSM) inspector Gail Kowaleski discovered a tipple operation of considerable size within 200 to 300 feet of Orbit's permit area. She visited this tipple, operated by Roberts Brothers Coal Co., Inc. (Roberts Bros.), and found no sedimentation control facilities. She discussed that situation with Mr. Bennie Roberts, one of the tipple's co-owners, and left without taking any enforcement action. Four days later she phoned Mr. Roberts to inform him that the tipple operation was subject to OSM regulation. Mr. Roberts assured her that the company could install sediment control devices within 30 days.

Upon her return to the site on Dec. 13, 1978, with two Environmental Protection Agency (EPA) officials, Ms. Kowaleski found that Roberts Bros. had constructed a berm to channel drainage directly into a nearby creek and had constructed no sedimentation ponds. The inspector issued Notice of Violation No. 78–II–21–12 to Roberts Bros. for failure to pass drainage through a sedimentation pond or series of ponds in violation of 30 CFR 715.17(a). Ms. Kowaleski terminated the notice on Mar. 7, 1979, after the company constructed two adequate sedimentation ponds, seeded and mulched the berm, and installed water treatment devices.

Roberts Bros. had filed an application for review of the notice of violation on Jan. 22, 1979. When OSM proposed a civil penalty of $3,500, Roberts Bros. requested an assessment conference, which resulted in a reduction of the proposed penalty to $900. Roberts Bros. then timely petitioned for review of the civil penalty assessment. At the hearing, held on Aug. 31, 1979, Administrative Law Judge William J. Truswell consolidated the two proceedings for hearing and decision.

In his Nov. 19, 1979, decision the Administrative Law Judge found that Roberts Bros. operates the tipple, which covers approximately 20 acres in Hopkins County, Kentucky. Roberts Bros. is solely owned by two brothers, Messrs. Bennie and Paul Roberts (Tr. 68–9). The operation buys coal from suppliers and prepares, weighs, crushes, and otherwise processes it for loading and resale (Tr. 64). The tipple's suppliers are in the surrounding area, the most remote operating approximately 25 miles away (Answer to Interrogatory No. 5, dated July 27, 1979). More than 50 percent of the coal bought by the tipple comes from operators working mines located on land leased from Roberts Bros., from Bennie and Paul Roberts individually, or from other corporations owned by Bennie and Paul Roberts (Tr. 82–4; Answer to Interrogatory No. 4, dated July 27, 1979). A corporation owned by Bennie and Paul Roberts owns mining machinery which it lends to suppliers of the tipple whenever necessary. Roberts Bros. controls the amount of coal delivered to the tipple by deciding how much of its property to lease (Tr. 86). Although there is no enforceable contract provision requiring the lessee operators to sell their coal to Roberts Bros., Mr. Bennie Roberts anticipates that all the coal produced by these operators will ultimately be delivered to the tipple to enable it to meet its contract demands (Tr. 104–5).

The Roberts brothers, individually, acquired the property where the tipple now stands in 1968; this property included the area where Orbit conducted its operation (Tr. 90–2). In 1978 the brothers transferred the land where the tipple is located to Roberts Bros. Coal Co., Inc. Title to the Orbit land and its minerals remained in the brothers individually (Tr. 92–4); they leased the land to Orbit Mining Co., which is owned by Gene Quisenberry (Exh. R–8). Orbit contracted with Glen Larkins to operate the mine (Tr. 21–2). "Mr. Quisenberry is also the owner of Kirkwood Excavating, Inc. * * * which is currently [and for the past several years] the largest supplier of coal to applicant's coal processing facility" (Dec. 4). Roberts Bros. advanced money to Quisenberry over a period of years, as security for which the latter pledged certain mining machinery, some of which was used at Orbit (Tr. 74–5, 87). Orbit is about 200 to 300 feet from the tipple (Tr. 21). The access road included as part of Orbit's permit area runs through Roberts Bros.' tipple facility (Tr. 19–20). All of Orbit's coal was processed at the tipple (Dec. 4; Tr. 76–7, 60–2; Exh. R–12). A particular section of the tipple site was set aside for the storage of coal produced by Orbit.

Administrative Law Judge Truswell concluded that the tipple operation was a "surface coal mining operation" within the meaning of 30 CFR 700.5, but reduced the civil penalty to $460. Roberts Bros. appealed this decision and briefs were filed by both parties.

Discussion and Conclusions

[1] Roberts Bros. contends the Administrative Law Judge erred in holding the tipple was a "surface coal mining operation" within the meaning of 30 CFR 700.5. To fall under the enforcement authority of OSM, the Roberts Bros. operation must fall within the definition of "surface coal mining operations" in the Surface Mining Control and Reclamation Act of 1977 (the Act), 30 U.S.C. § 1252(b) and (c) (Supp. I 1977), and 30 CFR 700.11 of the regulations. The Act (at 30 U.S.C. § 1291(28) (Supp. I 1977)) and the regulations (at 30 CFR 700.5) define that term in the same way:

> *Surface coal mining operations means*—
>
> (a) *Activities conducted on the surface of lands in connection with a surface coal mine* or, subject to the requirements of Section 516 of the Act, surface operations and surface impacts incident to an underground coal mine, the products of which enter commerce or the operations of which directly or indirectly affect interstate commerce. *Such activities include* excavation for the purpose of obtaining coal, including such common methods as contour, strip, auger, mountaintop removal, box cut, open pit, and area mining, the uses of explosives and blasting, and in situ distillation or retorting, leaching or other chemical or physical processing, and *the cleaning, concentrating, or other processing or preparation, loading of coal for interstate commerce at or near the mine-site,* * * * and
>
> (b) *Areas upon which the activities described in paragraph (a) above occur or where those activities disturb the natural land surface. These areas shall also include any adjacent land the use of which is incidental to any such activities, all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of those activities and for haulage* and excavation, workings, impoundments, dams, ventilation shafts, entryways, refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm banks, tailings, holes or depressions, repair areas, *storage areas, processing areas, shipping areas, and other areas upon which are sited structures, facilities, or other property or material on the surface, resulting from or incident to those activities.* [Italics added.]

Subsec. (a) defines surface coal mining operations as those activities conducted in connection with a surface coal mine at or near the minesite. Subsec. (b) adds to the definition the areas upon which those activities occur and any adjacent land incidentally used for such activities and for other enumerated purposes. The facility is 200 to 30 feet from Orbit's permit area. Orbit's access road, which is part of its permit area, runs through the area upon which Roberts Bros.' facility is located. The processing and storing done by Roberts Bros. are obviously "at or near the [Orbit] mine site." 30 CFR 700.5.

This, however, is but one test under the definition. The activities must also be "conducted * * * in connection with a surface coal mine." Regarding the connection between minesite and tipple, the facts herein fall between those in *Western Engineering, Inc.*, 1 IBSMA 202, 86 I.D. 336 (1979), and those in *Drummond Coal Co.*, 2 IBSMA 96, 87 I.D. 196 (1980). In *Western* we held that the facility of a company which operated a river terminal and acted as a contract handler of coal, but which did not own, operate, or lease any coal mines, was not a surface mining operation as defined in 30 CFR 700.5. In *Drummond* we held that a coal processing facility owned by the same company that completely supplies that facility from seven mines also owned by it, which mines range from 9 to 30 miles away, is operated "in connection with" those mines under 30 CFR 700.5.

Here, Bennie and Paul Roberts are the sole owners of the processing facility through Roberts Bros. and of the land and coal leased by Orbit, the adjacent mine in question, individually. Orbit is owned by Gene Quisenberry, who also owns Kirkwood Excavating, Inc., the largest supplier of Roberts Bros.' processing facility. All of Orbit's coal was stored at and processed by the Roberts Bros. facility. Although their lessee operators are not legally required to sell coal to Roberts Bros., Bennie and Paul Roberts anticipate that all the coal produced by their lessees will be sold to their corporation; the contract requirements of their tipple determine how much of their coal property they lease.

While the connection between Roberts Bros. and its suppliers is informal, it is clearly symbiotic. By definition, all tipples depend upon coal mines. However, unlike the situation in *Western*, where tipple and suppliers were created and operated independently, coming together when it was mutually advantageous, the initial decision to mine the Orbit property was made by its owners, the Roberts brothers, in order to satisfy the contractual demands of their tipple facility. That it was mined by others and that the facility is owned by the brothers' solely held corporation while the Orbit property is owned by them individually cannot change the fact that they leased their property to a coal mine operator through his solely held corporation to supply their tipple facility with all the coal he (or his sublessee) produced and that he did so. Moreover, they had every reason to believe that he would do so, for he, through another solely held corporation, had a close, ongoing business relationship with them; he borrowed money from them over a period of years, as security for which he pledged certain mining machinery, and his corporation was the largest supplier of coal to the brothers' tipple facility.

There is clearly a connection between the Roberts Bros.' tipple and the Orbit mine. However, is it the kind of connection contemplated by the regulations? Must the activity "conducted * * * in connection with a surface coal mine" be derivative in nature? That is, must it depend for its existence upon the surface coal mine? If so, Roberts Bros. would not be included. Orbit supplied only 2 percent of Roberts Bros.' coal (Answer to Interrogatory No. 2, dated Aug. 23, 1979). The mining operation came into existence after the tipple and, we are informed, ceased while the tipple continued operating. The facts in this case lead to the conclusion that the mine depended for its existence upon the tipple. Nevertheless, we conclude that such a derivative or incidental relationship is not necessary for an activity like that of Roberts Bros. to be included within the definition.

The language in the definition which appears to support an interpretation requiring such a derivative or incidental relationship is in the second part, 30 CFR 700.5, *Surface coal mining operations*, subsec. (b) and 30 U.S.C. § 1291(28)(B) (Supp. I 1977). Both state: "Such areas shall also include any adjacent land the use of which is incidental to any such activities" (*i.e.*, the activities enumerated in the first subsection); both contain the same dangling, concluding phrase: "resulting from or incident to such activities." That language describes adjacent areas upon which certain activities take place in addition to the areas upon which the activities enumerated in the first subsection occur. It is apparently intended to define additional areas to be covered, not to describe, define, or limit the activities included in the first subsection.

No such derivative language ("resulting from or incident to") is found in the first subsection defining activities in connection with a surface coal mine.[1] Nor can we discover any Congressional or Secretarial intent that the definition of such activities be so limited. That Orbit supplied only 2 percent of Roberts Bros.' coal supply does not alter the fact that the tipple was conducted in connection with Orbit and at or near the minesite. Accordingly, we affirm Administrative Law Judge Truswell's holding that the facility of Roberts Bros. is subject to the enforcement authority of OSM.

[2] Roberts Bros. also challenges the 15 civil penalty points assigned by the Administrative Law Judge for probability of occurrence. The Administrative Law Judge based this assignment on his finding that, because there is no sedimentation pond, "[w]ater pollution, the event the violated standard was designed to prevent, had occurred" (Dec. 8). OSM, through the testimony of its inspector and laboratory analysis of water samples taken from the receiving stream above and below the tipple and of discharges leaving the tipple, showed that the water in the stream, although poor to begin with,

---

[1] Except in the proviso, which is irrelevant.

was further polluted by the addition of discharges from the tipple.[2]

Roberts Bros. argues that this evidence should not have been admitted because of failure to show a proper chain of custody. The OSM inspector testified that she took ten samples and preserved the five that were to be tested for iron with nitric acid according to EPA requirements. Because of the lateness of the day, Larry Emmons, another OSM inspector participating in the inspection, refrigerated the other five samples at his home overnight (Tr. 29). These were to be tested for pH, acidity, and alkalinity. The laboratory report is signed: "Relinquished by: Laurence W. Emmons" (Exh. R-11).

That Inspector Emmons did not testify does not destroy the admissibility or credibility of this evidence. Roberts Bros. had at least three options in this instance: It could have challenged Inspector Kowaleski's testimony on cross-examination; it could have sought to force the appearance of Inspector Emmons; or it could have taken its own water samples and disputed the analysis directly. It did none of these things. Instead, it merely asserted that this testimony was hearsay, an objection going to the weight to be given the evidence, not to its admissibility.[3] The Administrative Law Judge committed no error in relying on this evidence to establish that further water pollution had occurred in assigning civil penalty points. We, therefore, affirm the 15 points assigned for probability of occurrence and the resulting total civil penalty of $460.

The Nov. 19, 1979, decision of Administrative Law Judge Truswell is affirmed.

NEWTON FRISHBERG
Administrative Judge

WILL A. IRWIN
Chief Administrative Judge

ADMINISTRATIVE JUDGE MIRKIN DISSENTING:

I view the applicability of the Act and regulations to processing plants to be derivative. First, a regulated mine must be found. Then a processing plant must be located that is operated in connection with and is sufficiently near that mine.[1] A plant has no independent status. It must be, for our purposes, an extension of a regulated mine and, therefore, subject to regulation.[2] Consequently, if the relationship between the mine itself and the processing plant is one that supports the required connection and nearness, any violation should be that of the mine operator and not the plant owner unless the two entities are the same.[3] In this case the mine permittee is Orbit Mining Co., not Roberts Bros. Roberts Bros. is the plant operator and the landlord of Orbit. No suggestion has been made that this arrangement is a device or scheme to avoid regulation by OSM (or even if it were that such would not be allowable).[4]

---

[2] Ten samples were taken: four each above and below the tipple and two at the tipple. Analysis showed a pH of 2.88 and 2.83 above the tipple, 2.53 at the tipple, and 2.77 and 2.81 below the tipple (Tr. 32). Analysis for iron showed a similar pattern (Tr. 31).

[3] Where there is no statute or regulation to the contrary, hearsay evidence is generally admissible in administrative proceedings. *See Richardson* v. *Perales*, 402 U.S. 389 (1971); *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683 (1948); 5 U.S.C. § 556(d) (1976).

[1] In a broad sense, every coal processing plant is operated in connection with coal mining. Otherwise the plant would not exist. But a connection with a mine (or mines under appropriate circumstances), not mining, is the connection that must be found. *See Drummond Coal Co.*, 2 IBSMA 189, 87 I.D. 347 (1980); *Drummond Coal Co.*, 2 IBSMA 96, 87 I.D. 196 (1980). The *Drummond* cases are also illustrative of the proposition that whether or not a plant is "near" the minesite depends upon the circumstances.

By the majority holding, this Board is now extending OSM's regulatory authority so that it applies to a plant operator who neither owns nor controls a nearby mine. The only connection with the mine here is ownership of the land on which the mine operates, which land has been leased to a nonrelated entity that operates it.[5] Instead of deriving OSM's authority to regulate a processing plant from its conceded power to regulate a mine, the Board is now, for the first time, stating that whenever a "connection" between a plant and a mine can be found (in this case one of landlord and tenant), each is separably regulable. I dissent.

MELVIN J. MIRKIN
Administrative Judge

ALABAMA BY-PRODUCTS CORP.

2 IBSMA 298

Decided *September 30, 1980*

Notice of appeal by the Office of Surface Mining Reclamation and Enforcement from the Mar. 10, 1980, decision on remand of Administrative Law Judge David Torbett in Docket Nos. NX 8-26-R and NX 8-27-R, vacating Notices of Violation Nos. 78-II-14-1 and 78-II-14-2 issued to Alabama By-Products Corp. for alleged violations of the topsoil provisions of 30 CFR 715.16.

---

[2] Were a plant to be deemed an independent, regulated entity, either by our construction of the existing regulations or their modification by the Secretary, the exemptions and immunities available to actual mines would supposedly be applicable to preparation plants, *e.g.*, the 2-acre exemption of 30 CFR 700.11 or the requirement of regulation of the activity by a state enunciated in *Dennis R. Patrick*, 1 IBSMA 158, 86 I.D. 450 (1979). Moreover, how is a preparation plant to involve itself with the "regulatory authority" in the many ways contemplated by 30 CFR 715 when there is no regulatory authority that either claims or concedes any kind of jurisdiction over it?

[3] Where the mine operator and the plant operator were different entities, but where we nevertheless found the plant to be operated in connection with the mine, we have held the mine operator, not the plant operator, to be liable. *Bethlehem Mines Corp.*, 2 IBSMA 215, 87 I.D. 380 (1980).

[4] We have held that common ownership can be evidence of a connection between a mine and a preparation plant, but in that case the owner was the permittee of both the mine and the plant (the state issued permits to preparation plants). *Virginia Iron, Coal and Coke Co.*, 2 IBSMA 165, 87 I.D. 327 (1980).

[5] It should not be overlooked that although the amount of coal sent for processing to Roberts Bros. by Orbit is the total output of Orbit, it is merely 2 percent of the total amount of coal processed by Roberts Bros. (majority opinion, p. 444).

Affirmed.

**Surface Mining Control and Recla-
tion Act of 1977: Topsoil: Alterna-
e Materials**

state regulatory authority may rely on
ta published by the Department of Ag-
ulture Soil Conservation Service on
ablished soil series in comparing na-
e topsoil to proposed alternative ma-
rials under 30 CFR 715.16.

**PPEARANCES: J. Fred McDuff,
q., and Fournier J. Gale III, Esq.,
rmingham, Alabama, for Alabama
-Products Corp.; J. T. Begley, Esq.,
fice of the Field Solicitor, Knoxville,
nnessee, and Marcus P. McGraw,
q., Assistant Solicitor for Enforce-
ent, Division of Surface Mining,
fice of the Solicitor, Washington,
C., for the Office of Surface Mining
eclamation and Enforcement.**

*PINION BY THE INTERIOR
BOARD OF SURFACE
INING AND RECLAMATION
APPEALS*

The Office of Surface Mining
eclamation and Enforcement
OSM) has sought review of a de-
sion of Administrative Law
udge David Torbett vacating two
otices of violation issued to Ala-
ama By-Products Corp., (ABC),
r alleged noncompliance with the
psoil provisions of 30 CFR
15.16. For the reasons discussed be-
w, we affirm that decision.

Background

On Aug. 16, 1978, OSM in-
pected ABC's No. 50 and No. 50–A surface mining pits in Jefferson County, Alabama, pursuant to the Surface Mining Control and Reclamation Act of 1977.[1] OSM issued Notices of Violation Nos. 78–II–14–1 and 78–II–14–2 to ABC for the alleged failure to remove, segregate, and stockpile topsoil as required by 30 CFR 715.16.

ABC sought administrative review of these notices, and on Mar. 1, 1979, a hearing was held at the close of which Administrative Law Judge Torbett vacated both notices. In vacating the notices, he found that ABC was using alternative materials in place of topsoil, that ABC had obtained approval for the use of alternative materials from the State regulatory authority, and that ABC had shown that the use of alternative materials was equal to or better than the use of native topsoil in achieving revegetation. OSM appealed that decision to the Board. An oral argument was held on July 10, 1979, and on Sept. 14, 1979, the Board issued a decision holding that "regardless of whether or not ABC had a mining and reclamation plan approved by the State of Alabama before the regulations [in 30 CFR 715.16] became effective, that plan must now meet the requirements of the interim regulations," *Alabama By-Products Corp.*, 1 IBSMA 239, 243, 86 I.D. 446, 448 (1979), and remanding the case to the Hearings Division. The Board required further findings on three questions:

---

[1] Act of Aug. 3, 1977, 91 Stat. 445, 30 U.S.C. § 1201–1328 (Supp. I 1977).

> 1. Whether the demonstration made by ABC and the approval given by the State regulatory authority were commensurate with the requirements of 30 CFR 715.16 (a)(4)(i) and (ii);
> 2. Whether approval, if commensurate with those requirements, was made before the use of alternative materials was commenced; and
> 3. Whether the alternative materials were being removed, segregated, and replaced in conformance with 30 CFR 715.16.

Alabama By-Products Corp., supra at 247, at 450.

On Feb. 2, 1980, Administrative Law Judge Torbett held a second hearing on the questions remanded by the Board. At that hearing, ABC presented evidence that the State regulatory authority had before it on Nov. 15, 1977 (Tr. 21), a March 1973 U.S. Department of Agriculture Soil Conservation Service study of the Montevallo soil series (Tr. 28–29, 41), the series present at the mine in question, and two reports on the spoil in the area of the mine, dated July 22, 1977, and prepared by Auburn University (Tr. 27, 30) ABC did not voluntarily or at the request of the regulatory authority present additional site-specific tests of the Montevallo series (Tr. 25–26, 38). The OSM inspector testified that he had not observed any stockpiles of homogenous alternative materials at the mine at the time of the inspection (Tr 12). ABC testified that there were no stockpiles because reclamation was almost concurrent with mining (Tr. 45–46).

In his decision from the bench, which was confirmed in writing on Mar. 10, 1980, after OSM filed a posthearing brief, the Administrative Law Judge found that the regulatory authority's approval was based on general knowledge of Alabama topsoil and the studies presented to it and that approval was given before the interim regutions became effective. Furthermore, he found that segregating and stockpiling topsoil was not required because of the way reclamation was conducted at this site. Upon the receipt of posthearing briefs he repeated that the regulatory authority had sufficient probative evidence before it upon which it could base a reasoned decision. OSM appealed this decision on Apr. 10, 1980, and both parties filed briefs.

Discussion and Conclusions

[1] The Administrative Law Judge resolved all of the questions on remand to be in favor of ABC and we see nothing in our examination of the record to disturb that resolution. Indeed, the only serious question presented is whether the Alabama Surface Mining Commission, the regulatory authority in charge, was entitled to rely on a study of the Montevallo soil series published by the Soil Conservation Service in comparing that soil series with proposed alternative materials. OSM urges, instead, that specific analysis of the topsoil for which substitution is sought must be presented to the regulatory authority. We reject this interpretation. A

topsoil analysis based on U.S.D.A. Soil Conservation Service published soil series data can be sufficient compliance with 30 CFR 715.16(a)(4), and it was so in this case.[2]

The decision of the Hearings Division is affirmed. ABC's request for oral argument is denied.

Newton Frishberg
Administrative Judge

Melvin J. Mirkin
Administrative Judge

CHIEF ADMINISTRATIVE JUDGE IRWIN CONCURRING:

I agree with my colleagues' result, but I think some further discussion is warranted.

For some time I have been troubled in this case by the question of who speaks for OSM, with what authority, and with what effect. On May 13, 1980, OSM's Knoxville Field Solicitor filed a brief arguing that the demonstration concerning suitability of alternative materials made by ABC was not commensurate with the requirements of 30 CFR 715.16(a)(4)(i). On June 2, 1980, OSM Director Heine issued a "final interpretive rule" concerning this regulation. (45 FR 39446, June 10, 1980.) Its purpose was to "[m]ake clear that the physical and chemical analyses, trials or tests, required by 30 CFR 715.16(a)(4)(i) * * * may be obtained from any one or a combination of the following sources: (a) U.S. Department of Agriculture Soil Conservation Service published data based on established soil series" and, indeed, the language of the rule so provided.[1] Two months later ABC filed a supplemental brief saying that it had not become aware of this interpretive rule until after it had filed its original brief (on June 30) and pointing out that the interpretive rule fully supported its argument throughout the case. A month after that OSM's Knoxville Field Solicitor filed a response "suggesting" the interpretive rule did not stand for the "proposition asserted" by ABC but, rather,

> Stands for two propositions:
>
> 1. Where the operator demonstrates that the topsoil and unconsolidated material beneath are of *insufficient quantity*, only the substitute materials must be analyzed in accordance with 30 CFR § 715.16(a)(4)(i);
>
> 2. If the operator desires to use overburden materials as a substitute for topsoil because the topsoil is of *insufficient*

---

[2] OSM's own interpretation of what constitutes acceptable practice coincides with this opinion. In Interpretive Rule 715.200(c), OSM provides that topsoil analyses may be based on "U.S. Department of Agriculture Soil Conservation Service published data based on established soil series." 45 FR 39447 (June 10, 1980). This interpretation is eminently reasonable and we concur with it.

[1] 45 FR 39447 (June 10, 1980) (to be codified at 30 CFR 715.200(c)) reads:

"(c) *Interpretation of § 715.16(a)(4)—Topsoil Removal.*

"(1) Results of physical and chemical analyses of topsoil and selected overburden materials to demonstrate that the selected overburden materials or overburden materials/topsoil mixture is more suitable for restoring land capability and productivity than the available topsoil, provided the analyses, trials, or tests are certified by a qualified soil scientist or agronomist, may be obtained from any one or a combination of the following sources:

"(i) U.S. Department of Agriculture Soil Conservation Service published data based on established soil series."

> *quality* as compared to the substitute, then both the topsoil and the substitute materials must be evaluated in accordance with 30 CFR § 715.16(a)(4)(i) (in order to demonstrate the superior quality of the substitute materials). [Italics in original.]

He then argued that proposition No. 2 is applicable in this case.

Neither OSM's Field Solicitor nor ABC discussed whether or under what circumstances an interpretive rule issued by OSM's Director may be binding on anyone other than OSM. Nor will I, absent any suggestions from counsel, since it is not necessary to the disposition of this case. But these and other questions concerning interpretive rules await full discussion and deliberation in the proper case. Among the other questions are what procedures must be followed in issuing, and who must sign, an interpretive rule in order for it to have the effect of law and whose interpretation of an interpretive rule is final if and when it does have that effect.

Will A. Irwin
Chief Administrative Judge

APPEALS OF DOT SYSTEMS, INC.

IBCA-1197-6-78 & IBCA-1204-8-78

Decided *September 30, 1980*

Contract No. 68-02-2834, Environmental Protection Agency.

Appeal No. 1197-6-78 dismissed. Appeal No. 1204-8-78 denied.

1. Contracts: Disputes and Remedies: Jurisdiction

Where the Board finds an indefinite quantity option-type contract to have been consummated by the parties, as opposed to a requirements-type contract, the contractor assumes the risk of whether the Government will order more than the minimum estimate of services anticipated to be ordered, and the Board, as a matter of law, is without jurisdiction to grant an equitable adjustment to the contractor under the changes clause, termination for convenience, or other contract clauses for claimed costs alleged to have resulted from the negligent preparation of maximum estimates.

2. Contracts: Contract Disputes Act of 1978: Jurisdiction

Where a contractor does not elect to come under the Contract Disputes Act of 1978, except as contained in counsel's posthearing reply brief; the contract is awarded in Aug. of 1977; no claim is pending before the contracting officer on Mar. 1, 1979; and the contracting officer reviews claims already denied after a prehearing conference conducted in Aug. of 1979, in a final attempt to reach a settlement before hearing; the Board holds that, in such circumstances, no valid election to come under the Act has been made, and therefore the Board has no jurisdiction under the Act.

3. Contracts: Disputes and Remedies: Termination for Convenience

Where it is undisputed that the Government ordered the minimum amount of services required to be ordered under an indefinite quantity option contract, and the Board finds that the failure of the contractor to timely perform delivery of the last seven call orders for services did not result from the low volume of work ordered by the Government, but instead, from reduction of typing staff, reduction of hours of typists employed to perform the contract, and failure to give priority to the contract work over other work, the contractor will be denied its request for a conversion of a termination for default to a termination for convenience of the Government.

APPEARANCES: Mr. Robert A. Johnson, Johnson & Vickery, Vienna, VA, and Mr. Paul L. Waldron, Thompson & Waldron, Washington, D.C., for Appellants; Mr. Anthony G. Beyer, Government Counsel, EPA, Durham, North Carolina, for the Government.

OPINION BY ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF CONTRACT APPEALS

Background

Contract No. 68-02-2834 was awarded to DOT Systems, Inc., of Vienna, Virginia (appellant), effective Aug. 15, 1977, by the Environmental Protection Agency (EPA), to provide typing support services for EPA's Office of Administration and component offices at Research Triangle Park, North Carolina. The initial performance period was from Aug. 15, through Sept. 30, 1977. The Government exercised one of its three options to extend the performance period for 12 months, extending the contract from Oct. 1, 1977, through Sept. 30, 1978.

The contract was executed by Mr. Franklin C. Broadwell, President of appellant, and by Mr. C. L. Foster, Contracting Officer for the Government. It was identified as an indefinite quantity, indefinite delivery, fixed unit price contract with the typing services to be performed by the contractor upon call orders issued by the Government from time to time. The contract listed various types of typing services to be performed in turnaround times of 48 hours, 72 hours, or 96 hours, but with a limitation on the quantities of each type work required to be completed and delivered by the contractor during any one month or any one week.

The quantity of work to be performed under the contract was governed by Article IV thereof, *as amended*, which provided as follows:

> **ARTICLE IV—*INDEFINITE QUANTITY***
>
> **A. This is an indefinite quantity contract for the supplies or services specified in the Schedule and for the period set forth therein. Delivery or performance shall be made only as authorized by orders issued in accordance with the "Ordering" article of this contract. The quantities of supplies or services specified herein are estimates only and are not purchased hereby.**
>
> **B. The maximum amount of supplies or services to which the Government will be entitled to order and the Contractor shall be required to furnish for the period ending September 30, 1977 shall be not more than $11,689.00 and the maximum amount of supplies or services required during the remainder of the contract (Options No. 1, 2, and 3) shall not exceed $397,889.00. The Government will order a minimum of $500.00 of the supplies or services set forth in the Schedule.**
>
> **C. Orders issued during the effective period of this contract and not completed**

> within that time shall be completed by the Contractor within the time specified in the order, and the rights and obligations of the Contractor and the Government respecting those orders shall be governed by the terms of the contract to the same extent as if completed during the effective period of this contract, provided that the Contractor shall not be required to accept any orders beyond the completion date of the period of performance set forth in the schedule.

Appellant complained continually to the contracting officer throughout the contract performmance about the low volume of work ordered by the Government and, on or about Dec. 5, 1977, asked to be released from a contract requirement to maintain a typing facility in the area of Research Triangle Park, North Carolina. The contracting officer, however, by letter dated Jan. 19, 1978, directed appellant to establish a fully operational facility in that area in conformance with its commitment to do so in its response to the Request for Procurement (RFP). The contract work was performed without incident, except for the continuing complaints regarding the low volume of work, until May of 1978. On May 5, 1978, appellant made a request to the contracting officer for an adjustment of the contract providing for a $7,500 guaranteed monthly utilization of appellant's services retroactive to the effective date of the contract. In support of the request, appellant listed eight vouchers totaling $8,906.14 worth of work ordered by the Government for the period from Aug. 31, 1977, through Apr. 30, 1978. This total figure was corrected by $750 to a total of $8,156.14 by a subsequent letter, dated May 30, 1978. The two May 1978 letters were treated together as a claim by the appellant under the disputes clause. They charged the Government with bad faith because of the disparity between the Government's work estimates and the work actually ordered; for requiring the maintenance of the second office facility in the Durham, North Carolina, area; and because the EPA offices for which the contract work was to be performed had acquired additional word processing equipment to perform the work for which appellant claimed it had contracted.

By his decision of June 9, 1978, the contracting officer determined that there was "no contractual basis for the relief requested." His denial of the claim rested upon several points, including the following:

1. That the solicitation specifically stated that the type of contract contemplated by the Government would be an Indefinite Quantity, Indefinite Delivery with fixed unit prices contract.

2. That Article IV of the solicitation specified that the Government would order a minimum of $500 of the services set forth in the schedule, which was fulfilled.

3. That Article IV also stated in paragraph A that the quantities of supplies or services specified are estimates only and not purchased with the award of the contract.

4. That the last sentence of Article II provides that: "The above estimates [in Article II] are for pur-

poses of evaluation only and do not constitute a Government commitment as to the actual amount of work that may result under this contract."

5. That the Government has acted in good faith, in that the minimum requirement was fulfilled, and invoices properly processed; as much overflow typing as possible was given to appellant; and no requirements were imposed upon the appellant in the performance of the contract which were not contained within the contract itself and agreed to during negotiations.

Appellant sent a notice of appeal to the contracting officer, dated June 19, 1978, which was mailed to this Board on June 27, 1978, and docketed by the Board on June 30, 1978, as appeal No. IBCA-1197-6-78.

Appellant continued to perform acceptably under the contract until mid-July 1978 when a problem of delinquent deliveries developed resulting in the issuance of a termination for default by the contracting officer on Aug. 9, 1978. A timely notice of appeal to the Board was filed by appellant and docketed as appeal No. IBCA-1204-8-78, Sept. 20, 1978.

The two appeals were consolidated for hearing and decision. An evidentiary hearing was conducted at Arlington, Virginia, on Oct. 2 and 3, 1978.

By its complaint with respect to the first appeal, the appellant requested an equitable adjustment in contract price "as the Board may deem appropriate." The grounds were basically the same as contained in its claim submitted to and denied by the contracting officer, but alleging its belief of entitlement to an equitable adjustment in excess of $100,000, and significantly, alleging further in paragraph 6, the following: "At all times pertinent to this appeal, both parties interpreted the contract as requiring Respondent to order from Appellant its typing needs in excess of Respondent's capability to perform such services at the time of contracting."

This allegation was denied by the Government in its answer wherein it also alleged that the subject contract was not a "Requirements" contract, but rather, was negotiated and awarded to appellant as an "Indefinite Quantity" contract within the meaning of sec. 1-3.409(c) of the Federal Procurement Regulations.[1]

---

[1] The Federal Procurement Regulations (FPR), found in Title 41 of the *Code of Federal Regulations* (CFR), at 41 CFR 1-3.409 (b) and (c), point out some of the differences between a "requirements-type contract" and an "indefinite quantity-type contract" as follows:

"(b) *Requirements contract*—(1) *Description*. This type of contract provides for filling all actual purchase requirements of specific property or services of designated activities during a specified contract period with deliveries to be scheduled by the timely placement of orders upon the contractor by activities designated either specifically or by class. * * * An estimated total quantity is stated for the information of prospective contractors, which estimate should be as realistic as possible. The estimate may be obtained from the records of previous requirements and consumption, or by other means. Care should be used in writing and administering this type of contract to avoid imposition of an impossible burden on the contractor. Therefore, the con-

(Continued)

By its complaint with respect to the second appeal, appellant sought conversion of the default termination of the contract into a termination for convenience of the Government on the grounds: That any delay was the result of unanticipated low volume of work orders, beyond the control and without the fault or negligence of appellant, and therefore, excusable; that the Government's termination for default was issued without a proper cure notice; and that even if the cure notice was proper, the alleged deficiencies of performance were corrected prior to the issuance of the termination notice.

The pertinent allegations of the complaint in this appeal were denied by the Government.

Issues Presented On Appeal

Whether this Board has jurisdiction in the circumstances of appeal No. IBCA-1197-6-78 to grant an equitable adjustment as requested by appellant.

Whether, in the second appeal, appellant has sustained its burden in proving entitlement to a conversion from a default termination to a termination for convenience of the Government.

Discussion

Jurisdiction of the Board

A. Under the Contract Provisions

Appellant contends in its posthearing briefs that the Board has jurisdiction of appellant's claim for an equitable adjustment due to negligently prepared estimates under both the changes and termination for convenience clauses; that the Board has jurisdiction under the Contracts Disputes Act of 1978; that the instant contract was in fact a limited form of requirements contract entitling appellant to an equitable adjustment under the changes clause as a result of the Government's increasing its own word

---

(Continued)
tract shall state, where feasible, the maximum limit of the contractor's obligation to deliver and, in such event, shall also contain appropriate provision limiting the Government's obligation to order. * * *

"(2) *Application*. A requirements contract may be used for procurements where it is impossible to determine in advance the precise quantities of the property or services that will be needed by designated activities during a definite period of time. Advantages of this type of contract are: * * * (iii) Where production lead time is involved, deliveries may be made more promptly because the contractor is usually willing to maintain limited stocks in view of the Government's commitment.

* * * * *

"(c) *Indefinite quantity contract*—(1) *Description*. This type of contract provides for the furnishing of an indefinite quantity within stated limits of specific property or services, during a specified contract period, with deliveries to be scheduled by the timely placement of orders upon the contractor by activities designated either specifically or by class. * * * The contract shall provide that during the contract period the Government shall order a stated minimum quantity of the property or services and that the contractor shall furnish such stated minimum and, if and as ordered any additional quantities not exceeding a stated maximum which should be as realistic as possible. * * *

"(2) *Application*. An indefinite quantity contract may be used where it is impossible to determine in advance the precise quantities of the property or services that will be needed by designated activities during a definite period of time and it is not advisable for the Government to commit itself for more than a minimum quantity. Advantages of this type of contract are:

* * * * *

"(iii) The obligation of the Government is limited.

processing capabilities during the contract performance; and that the contracting officer's directive that appellant maintain a facility in the Durham, North Carolina, area constitutes a compensable change.

Although the Board is not unsympathetic with appellant's position on the merits in this case, in view of the wide disparity between the Government's estimates of maximum quantities of services anticipated to be ordered under the subject contract and the quantity actually ordered, the question of *jurisdiction* of the Board to grant the relief requested must first be resolved.[2]

Appellant complains of the Government's tactics in not raising the jurisdictional question at pretrial or at the hearing and by raising the question only in its posthearing brief. We point out, however, that a question of jurisdiction of any tribunal has traditionally and fundamentally been held many times to be subject to question by any party or by the tribunal itself at any time before decision.

We also point out that sec. 4.105 of our Interim Rules of Practice states that the "Board has authority to raise at any time and on its own motion the issue of its jurisdiction." We grant that the Government here could have, and perhaps should have raised the question sooner and more directly than it did. However, appellant was not entirely without notice. As noted above, in his decision of June 9, 1978, the contracting officer determined that there was "no contractual basis for the relief requested" (Appeal File I–2).

To sustain its position that the Board does have jurisdiction to grant appellant an equitable adjustment, appellant argues that the type of contract involved here was really a "limited requirements contract" (Appellant's Reply Brief, pp. 18–21). In fact, a careful review of the pertinent cases relied upon by appellant reveals that they were all involved with some form of a requirements contract as opposed to an indefinite quantity, indefinite delivery option contract. Appellant argues that the determination of the type of contract involved should not rest on the label attached to it, but rather on its substantive provisions. We agree that such determination should not rest on the label alone, although the label does have some persuasive force in identifying the intent of the contracting parties at the time they entered into the contract. Regardless of the determining factors otherwise involved, it is clear that the Board must first reach a conclusion with respect to the type of contract consummated by the parties as a preliminary basis for deciding the jurisdictional question.

What, then, are the indicia presented by the contract documents?

---

[2] For a discussion of the jurisdiction of agency Boards of Contract Appeals being limited to that provided by the Disputes Clause and other specific contract clauses (prior to the Contracts Disputes Act of 1978), *see United States v. Utah Construction and Mining Co.*, 384 U.S. 394 (1966).

1. Article IV of the contract (set out in the background statement above) sets forth that the maximum services to be furnished by the contractor shall not exceed $11,689 during the first period or $397,889 during the remainder of the contract and that the Government will order a minimum of $500. The contract is stated to be "an indefinite quantity contract."

2. The Solicitation for Bids was issued on standard form 33A and the instructions and conditions thereof at page 25 provided: "25. TYPE OF CONTRACT CONTEMPLATED. It is contemplated that an Indefinite Quantity, Indefinite Delivery Contract with fixed unit prices will result from this solicitation."

3. The offer of the appellant, dated June 27, 1977, and executed by Mr. Broadwell, was immediately preceded, on standard form 33, entitled, Solicitation, Offer, and Award, issued on May 27, 1977, by the following words in capital letters: "THIS IS A 100% SMALL BUSINESS SET-ASIDE *TYPING SUPPORT SERVICES (INDEFINITE QUANTITY, INDEFINITE DELIVERY)*." (Italics in original.)

4. Article XX of this contract, entitled, "Right to Award Other Contracts and Orders" stated: "The Government (EPA) reserves the right to award contracts and orders to other companies for like services during the same performance period as this contract."

On the basis of the foregoing indicia, we find and conclude that the type of contract involved in these appeals is a fixed unit price, indefinite quantity, indefinite delivery option-type contract—not a requirements contract. We are particularly influenced toward that finding and conclusion by Article XX of the contract. That provision clearly removes the subject contract from the category of a requirements contract, limited or otherwise, by permitting the Government to contract with other parties for the same services during the same performance period.

So, what is the effect of that conclusion on the rights and obligations of the parties?

Appellant relies heavily on *Integrity Management International, Inc.*, ASBCA No. 18289 (Apr. 24, 1975), 75-1 BCA par. 11,235, *aff'd On Reconsideration*, 75-2 BCA par. 11,602, which held that in a *requirements contract* for food services required of the contractor, a negligently prepared estimate constituted a partial termination for convenience of the Government. In *Radionics, Inc.*, ASBCA No. 20796 (Feb. 28, 1977), 77-1 par. 12,448, the Armed Services Board found that the record did not support the allegations of negligence in the preparation of the Government estimates, and therefore, did not reach the question of whether the rule in *Integrity Management* should apply. It did, however, undertake to identify the difference of risk assumed by a contractor in a *requirements contract* as opposed to an *indefinite quantity option* contract stating at page 60,312:

> There is a fundamental difference between a requirements contract of the type represented by the *Integrity Management* case and an indefinite quantity option contract. In a typical requirements contract the Government undertakes to procure from the contractor either all or a specifically-defined portion of its requirements for certain supplies or services that will develop during the contract period. The exact requirements are usually not known but the contractor has the right to receive whatever business was generated in the specified areas. Estimates of the expected amount of services or supplies to be required are furnished to guide the bidders in establishing their unit prices for the required services or supplies. *Since the contractor assumes only the risk of fluctuating objective requirements, relief has been granted in cases of negligently-prepared Government estimates because they constituted misrepresentations on which the contractor relied to its detriment.*
>
> Under an indefinite quantity option contract the contractor is guaranteed orders for the basic or minimum quantity. There is no promise or legal obligation on the part of the Government to satisfy its requirements for this type of services or supplies from the available options, and, if it so chooses, the Government could procure additional quantities of such supplies and services from other sources. See 47 Comp. Gen. 155, 159 (1967). Thus the exercise of options is not necessarily determined by the Government's actual requirements during the contract period but by a number of other factors. *The holder of an option contract is thus from the outset put on notice of the risk it would assume in relying on the maximum quantity estimate for pricing purposes.* [Italics supplied.]

Based upon the authorities cited in its posthearing briefs, it is clear that appellant has failed to ascertain the difference between the risk assumed by a contractor pursuant to a requirements contract as distinguished from an indefinite quantity option contract.

[1] Appellant has sited no authority, and we have found none, which would permit this Board to grant an equitable adjustment under the changes clause or termination for convenience clause or any other contract provision of the type of contract involved here even if we were to find negligence on the part of the Government in preparing its estimates. Further, we find no evidence in the record of these proceedings in support of appellant's claim that the Government personnel involved with the administration of the subject contract acted in bad faith, or, at any time interpreted it as requiring the Government to order from appellant its typing needs in excess of the Government's own capability to perform such services at the time of contracting. It is thus apparent that no jurisdiction obtains in this Board to grant the relief requested under the contract provisions of the contract under consideration. Further, we find and hold that this record contains no evidence or cited authority which would form a basis for finding a compensable change in

the contracting officer's directive that appellant maintain its Durham, North Carolina, facility. In fact, that directive in our view constituted no change at all, either express or implied, since all the contracting officer did was to reiterate an existing contract provision. No change in this respect was involved. Since we find that the Board lacks jurisdiction to grant the equitable adjustment requested as a matter of law, we do not need to reach, and do not reach, the factual determination regarding the alleged negligence.

B. Jurisdiction Under the Contracts Disputes Act of 1978

As an alternative argument, appellant contends that even if the Board has no jurisdiction pursuant to the contract provisions, it does have jurisdiction under the Contracts Disputes Act of 1978 (the Act). If the Board does have jurisdiction under the Act, then, of course, it would have the authority to reform the contract under the enlarged powers granted to Boards of Contract Appeals by sec. 8(d) of the Act.[3] By permission of the Board, Counsel for the appellant submitted as an addition to the record a letter dated July 14, 1980, in which it stated that counsel for the Government agrees to the following as an accurate statement of the facts pertaining to possible grounds for jurisdiction under the Act:

> After the Pre-Hearing Conference on the above-referenced Appeals, Government counsel, Mr. Anthony Beyer, requested the Contracting Officer, Mr. Charles Foster, to again review Appellant's claims on the merits. Mr. Foster completed this review and again decided that Appellant's claims were without merit and denied that Appellant was entitled to any recovery.

We understand that the cited review by the contracting officer was requested as a final attempt to reach an amicable settlement in light of the views expressed at the prehearing conference. Appellant contends that in this circumstance, the claim, whether for breach of contract or otherwise, lodges jurisdiction with Board under the Act.

[2] We do not accept that contention. The prehearing conference was held Aug. 2, 1979. The contracting officer's initial decision was made June 9, 1978. The evidentiary hearing was held Oct. 2 and 3, 1979. The election to proceed under the Act was not made by appellant until set forth in its posthearing Reply Brief. The contract involved here was entered into in August 1977. Under this sequence of events, we are unable to find that any claim of appellant in these proceedings was pending before the contracting officer on Mar. 1, 1979, or initiated after that date. Thus, the election to come under the Act has no validity.

---

[3] Sec. 8(d) of the Contracts Disputes Act of 1978 broadens the jurisdiction of agency Boards of Contract Appeals "to grant any relief that would be available to a litigant asserting a contract claim in the court of claims." P.L. 95-563, 92 Stat. 2383, 41 U.S.C. §§ 601-613 (Supp. II 1978).

our opinion in *L. M. Johnson,*
., IBCA-1268-5-79 (Sept. 28,
9), 86 I.D. 508, 79-2 BCA par.
969.

Ve hold, therefore, that appel-
has not shown this Board's au-
rity to grant an equitable adjust-
t as requested under either the
tract provisions or under the
tract Disputes Act of 1978.

The Termination Issue

Appeal No. IBCA-1204-8-78

its posthearing initial brief,
ellant argues that the Govern-
t's termination for default was
roper and should be converted
termination for convenience,
use: (a) the Government failed
roperly exercise its discretion,
(b) the period of time set by
Government to cure the alleged
iencies was unreasonable and
out legal effect.

he Government, on the other
l, contends that the termination
default was proper because the
inuing late deliveries resulted
appellant's abandonment of
bligations to perform under the
ract, and that neither the unan-
ated low volume of work nor
llant's dire financial position
titutes excusable cause for non-
ormance.

its posthearing reply brief ap-
nt argues that delay in per-
ing call order No. 99 was insig-
ant and not a legally sufficient
nd for default termination; that the time period for curing the alleged deficiencies was unreasonable and improper; and that appellant's default, if any, was excusable because it was proximately caused by the Government's negligent contract estimates.

The evidentiary basis for the Government's charges of abandonment of performance includes the following:

(1) Testimony of the Government's Project Officer, Darlene Jones, (Tr. 2:127 and 2:132) to the effect that when call order No. 99, pertaining to important procurement documentation, was not delivered on time, July 17, 1978, she called the DOT office and the sole remaining staff typist stated that the DOT Systems project officer had instructed her to stop work on orders issued under the contract and to work on another project instead.

(2) The cure notice by letter dated July 18, 1978, from the contracting officer citing the deliquency concerning call order No. 99, requesting information as to the cause of the delay and steps planned to be taken by appellant's president to preclude continuation of the problems, and requesting a reply by July 31, 1978 (Appeal File, Tab I:4).

(3) The return receipt attached to the cure notice indicating that the same was received by DOT on July 21, 1978 (Appeal File, Tab I:4).

(4) The reply to the cure notice

from DOT's president dated Aug. 1, 1978, and received by the contracting officer on Aug. 4, 1978, advising that DOT was undertaking an investigation of the matter; that it was emphasized to the staff that the contract work was to be performed within the prescribed schedule; and, suggesting that the low volume of work provided by the Government "has impacted on our staffing and internal processing procedures" which "could have contributed to any delay that we may determine to have actually occurred" (Appeal File, Tab I:3).

(5) Appellant's Exhibit No. 36 showing that for the period July 3 through Aug. 11, 1978, the 6-week period in which the delinquent performance problems arose, the remaining staff typist at the Durham office was limited to an average of 8 hours of work per week on the subject contract, while during the preceeding 6-week period, the average time of the two typists involved was 17 hours per week for each typist.

(6) Appellant's Exhibit No. 14, entitled, "Summary of Contractors Claims," indicating the performance of DOT with respect to the last seven call orders placed by the Government as follows:

Call Order No.	Date	Due Date	Date Received
OH 99	7/11/78	7/17/78	7/25/78
OH 100	7/14/78	7/20/78	7/27/78
OH 101	7/18/78	7/24/78	8/ 2/78
OH 102	7/21/78	7/27/88	8/ 4/78
OH 103	7/25/78	7/31/78	8/ 8/78
OH 104	8/ 1/78	8/ 7/78	8/14/78
OH 105	8/ 3/78	8/ 9/78	8/16/78

On Aug. 9, 1978, the contracting officer issued a Notice of Termination of the subject contract for default in accordance with Clause No. 11 of the General Provisions.[4] It was effective upon receipt, which was Aug. 14, 1978, as evidenced by

---

[4] The Default Clause, Sec. 11 of the General Provisions of the subject contract, provides in pertinent part as follows:

"11. Default.

"(a) The Government may, subject to the provisions of paragraph (c) below, by written notice of default to the Contractor, terminate the whole or any part of this contract in any one of the following circumstances:

"(i) If the Contractor fails to make delivery of the supplies or to perform the services within the time specified herein or any extension thereof; or

"(ii) If the Contractor fails to perform any of the other provisions of this contract, or so fails to make progress as to endanger performance of this contract in accordance with its terms, and in either of these two circumstances does not cure such failure within a period of 10 days (or such longer period as the Contracting Officer may authorize in writing) after receipt of notice from the Contracting Officer specifying such failure.

* * * * *

"(c) Except with respect to defaults of subcontractors, the Contractor shall not be liable for any excess costs if the failure to perform

(Continued)

the return receipt (Appeal File, Tab I:2). Such notice also constituted the contracting officer's decision that appellant was in default due to its fault and negligence and that the volume of work ordered by the Government is not justification or excuse for DOT's continual failure to perform within the time required by the contract. We note that appellant failed to discuss in either of its briefs the last six call orders numbered 100–105, all of which were performed late according to the performance schedules and were part of the basis for the termination for default. We also observe that appellant cited, "*42 Products*, GSBCA Nos. 4534, 4562, 77–1 BCA par. 12,267 [par. 12,268]," where the Board by *dicta* indicated that had the appellant been able to establish that the Government was negligent in formulating estimates, the resulting failure to perform may have been deemed excusable. But again, that case involved a *requirements-type* contract and not an indefinite quantity option-type contract, such as involved here, where the contractor assumes the risk of the amount of services ordered by the Government over and above the guaranteed minimum. That the Government fulfilled its obligation to order the minimum of $500 worth of services is undisputed.

[3] Based upon the foregoing, and our review of the entire record in this appeal, we find: That the failure of the contractor here to accomplish timely delivery of the typing service with respect to the last seven call orders placed by the Government under the subject contract, did not result from the low volume of work ordered, but rather, from reduction of the typing staff, reduction of hours of typists employed to perform the contract, and failure to instruct employees to give priority to the contract work over other work. We further find that the Government has made out a prima facie case for a valid termination for default; that the contractor failed to adduce any evidence showing that the failure of performance was excusable under the provisions of Clause 11(c), General Provisions of the contract; that there was nothing improper about the cure notice issued by the contracting officer on July 18, 1978; and that the discretion exercised by the contracting offi-

---

(Continued)
the contract arises out of causes beyond the control and without the fault or negligence of the Contractor. Such causes may include, but are not restricted to, acts of God or of the public enemy, acts of the Government in either its sovereign or contractural capacity, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather; but in every case the failure to perform must be beyond the control and without the fault or negligence of the Contractor. If the failure to perform is caused by the default of a subcontractor, and if such default arises out of causes beyond the control of both the Contractor and subcontractor, and without the fault or negligence of either of them, the Contractor shall not be liable for any excess costs for failure to perform, unless the supplies or services to be furnished by the subcontractor were obtainable from other sources in sufficient time to permit the Contractor to meet the required delivery schedule."

cer in issuing both the cure notice and notice of termination was justified under the circumstances of this case.

Therefore, the request of appellant to convert the termination for default to a termination for convenience of the Government must be denied.

Decision

Having determined that the Board is without jurisdiction to grant the relief requested by appellant, appeal No. IBCA-1197-6-78 is dismissed. Having found that appellant failed to overcome the prima facie case established by the Government in support of the validity of its termination for default, appeal No. IBCA-1204-8-78 is denied.

DAVID DOANE,
Administrative Judge.

WE CONCUR:

RUSSELL C. LYNCH
Administrative Judge

WILLIAM F. MCGRAW
Chief Administrative Judge

STEPHEN W. FOX

50 IBLA 186

Decided *September 30, 1980*

Appeal from decision of the New Mexico State Office, Bureau of Land Management, declaring mining claim null and void. NM MC 58082.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Withdrawals—Mining Claims: Withdrawn Land—Withdrawals and Reservations: Effect of

A mining claim located on land temporarily segregated from appropriation under the mining laws pursuant to 43 U.S.C. § 1714(b) (1976) is null and void ab initio.

2. Federal Land Policy and Management Act of 1976: Withdrawals—Mining Claims: Withdrawn Land—Secretary of the Interior—Withdrawals and Reservations: Effect of

Under 43 U.S.C. § 1714(b) (1976) a publication in the *Federal Register* of notification of an application for withdrawal, which publication temporarily segregates land from the operation of the mining laws, does not withdraw the land, and therefore the notice need not be signed by the Secretary or an individual in the Office of the Secretary who has been appointed by the President, by and with the advice and consent of the Senate.

APPEARANCES: Stephen W. Fox, pro se.

OPINION BY ADMINISTRATIVE JUDGE GOSS

INTERIOR BOARD OF LAND APPEALS

Stephen W. Fox appeals from a July 27, 1979, decision of the New Mexico State Office, Bureau of Land Management (BLM) declaring appellant's mining claim null and void ab initio. Appellant's claim was located on July 10, 1979, in the SE

¼ sec. 20, T. 22 S., R. 31 E., New Mexico principal meridian.

The lands claimed by appellant were temporarily segregated from the operation of the mining laws by a notice published in the *Federal Register* entitled "Notice of Proposed Withdrawal and Reservation of Lands." 43 FR 53063 (Nov. 15, 1978). The temporary segregation is the result of an application (NM 35375) filed by the U.S. Department of Energy on Oct. 13, 1978, for the withdrawal of approximately 17,200 acres. The Department of Energy desires the lands for a waste isolation pilot plant.

In his statement of reasons, appellant presents the following arguments: (1) The Department of Energy application for withdrawal is a renewal of an application filed in 1976, which is not provided for by the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701–1782 (1976); (2) the provisions of 43 U.S.C. § 1714 (1976), pertaining to notification of Congress and public hearings, have not been complied with; (3) pursuant to 43 U.S.C. § 1714(b)(1) (1976), the Chief, Branch of Lands and Minerals Operations, is not empowered to sign withdrawal notices, therefore, the notification in the *Federal Register* is invalid.

[1] It is well established that a mining claim located on land which is not subject to mineral entry at the time of location is null and void from its inception. *Glen H. Brooks*, 45 IBLA 51 (1980). The claim was located on July 29, 1979, well after the segregation. Therefore, if the segregation is valid the mining claim was properly declared void ab initio.

[2] The temporary segregation was authorized by sec. 204(b) of FLPMA, 43 U.S.C. § 1714(b)(1) (1976), which provides:

> Within thirty days of receipt of an application for withdrawal, and whenever he proposes a withdrawal on his own motion, the Secretary shall publish a notice in the Federal Register stating that the application has been submitted for filing or the proposal has been made and the extent to which the land is to be segregated while the application is being considered by the Secretary. Upon publication of such notice the land shall be segregated from the operation of the public land laws to the extent specified in the notice. The segregative effect of the application shall terminate upon (a) rejection of the application by the Secretary, (b) withdrawal of lands by the Secretary, or (c) the expiration of two years from the date of the notice.

Appellant's statement that application No. NM 35375, filed Oct. 13, 1978, is a renewal of an application filed in 1976, is not indicated by the record before the Board. It would be proper, however, for the Secretary to choose to follow the withdrawal procedure in sec. 1714, regardless of whether a previous application had been filed.

As to appellant's other arguments, a review of the legislative history of FLPMA has not disclosed any guide as to interpretation of this section of the Act.

Sec. 1714(b)(1) provides a two-step procedure concerning withdrawals. The first step is the publication of notice in the *Federal Register* that an application for a withdrawal has been filed and setting forth the extent to which the land is to be segregated while the application is being considered by the Secretary. The statute provides for the termination of the segregative effect of the application upon (a) rejection of the application by the Secretary, (b) withdrawal of lands by the Secretary, or (c) the expiration of 2 years from the date of the notice.

Sec. 1714(c) is not applicable until after the Secretary, or one of his delegates has followed the procedure required under sec. 1714(b). It is not until withdrawal, as distinguished from segregation while an application or Secretarial proposal is being considered, that the congressional approval procedures required by sec. 204(c) are triggered. Therefore, appellant's objections that the procedures required by sec. 204(c) have not been met are premature, since the land in question has not been withdrawn by the Secretary.

The third argument of appellant is that the segregation of the lands is invalid because it is the result of an improperly issued notice. Appellant contends that, pursuant to 43 U.S.C. § 1714(a) (1976), the notice published in the *Federal Register* was required to be signed by the Secretary or one of the individuals authorized by the statute.

Sec. 1714(a) provides:

> On and after the effective date of this Act the Secretary is authorized to make, modify, extend, or revoke withdrawals but only in accordance with the provisions and limitations of this section. The Secretary may delegate this withdrawal authority only to individuals in the Office of the Secretary who have been appointed by the President, by and with the advice and consent of the Senate.

Again we must distinguish between a withdrawal and a temporary segregation. Sec. 1714(a) limits the Secretary's delegation of authority regarding *withdrawals*. In contrast, the published notice served only to temporarily segregate the land from operation of the public land laws under sec. 1714(b). The temporary segregation is limited to a maximum of 2 years, while a withdrawal may be for a period of 20 years. The temporary nature of the segregation leads to the conclusion that a notice of the application for withdrawal need not be signed by the Secretary or one of the limited delegates under sec. 1714(a).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Joseph W. Goss
Administrative Judge

WE CONCUR:

ANNE POINDEXTER LEWIS
Administrative Judge

FREDERICK FISHMAN
Administrative Judge

WAYNE E. DeBORD

50 IBLA 216

Decided *September 30, 1980*

Appeals from decisions [1] of the Colorado, Montana, and New Mexico State Offices, Bureau of Land Management, rejecting offers or cancelling 29 oil and gas leases.

Affirmed as modified.

1. Oil and Gas Leases: Applications: Drawings—Oil and Gas Leases: Applications: Sole Party in Interest—Words and Phrases

"Interest in an oil and gas lease or offer." Where a party to a pooling agreement is authorized to advance funds for filing of drawing entry cards in simultaneous oil and gas lease drawings, payment of rentals, and office expenses, and is entitled to be reimbursed therefor with interest and receive a consultation fee from the pooled proceeds of any leases issued, all parties to the agreement have an interest in each lease offer within the meaning of 43 CFR 3102.7, requiring the disclosure of interested parties.

2. Oil and Gas Leases: Applications: Drawings

Where a party to a pooling agreement is authorized to advance funds for filing drawing entry cards in simultaneous oil and gas lease drawings, payment of rentals, and office expenses, and is entitled to be reimbursed therefor and receive a consultation fee from the pooled proceeds of the sale or assignment of any lease issued, the filing in a lease drawing for a particular parcel by more than one party to the agreement constitutes a multiple filing in violation of 43 CFR 3112.5–2.

3. Oil and Gas Leases: Applications: Generally—Oil and Gas Leases: Applications: Drawings

An entry card in a simultaneous oil and gas lease drawing need not be rejected under 43 CFR 3112.2–1(a) where the offeror's name and address are affixed with a rubber stamp outside the preprinted boxes but are otherwise legible on the face of the card.

APPEARANCES: Lynn J. Farnworth, Esq., Moscow, Idaho, for appellants; Harold J. Baer, Jr., Esq., Office of the Solicitor, Denver Region, Denver, Colorado, for Bureau of Land Management.

---

[1] Appendix A contains a list of the cases consolidated, the appellants and the 29 leases affected. In IBLA 80–584, *Terrie K. Landis*, BLM approved a lease assignment by appellant to the Champlin Petroleum Co., "as to the interest it acquired" as a "bona fide purchaser," and canceled the overriding royalty interest retained by the appellant. Similarly in IBLA 80–675, *Vickie J. Landis*, BLM recognized Public Lands Exploration, Inc., as a bona fide purchaser from the appellant and canceled the overriding royalty interest retained by appellant. In IBLA 80–265, *Diane M. Weeks*, BLM denied an assignment from appellant Weeks to Terrie K. DeBord. The conclusions herein apply also to those cases.

OPINION BY ADMINISTRATIVE JUDGE GOSS

INTERIOR BOARD OF LAND APPEALS

This case involves appeals from decisions of the Colorado, Montana, and New Mexico State Offices, Bureau of Land Management, rejecting appellants' offers to lease or cancelling appellants' leases because (1) they failed to comply with the disclosure requirements of 43 CFR 3102.7 [2] pertaining to "sole party in interest"; or (2) they violated the provisions of 43 CFR 3112.5–2 as to multiple filings; or (3) their drawing entry cards (DEC) were deemed not "fully executed" within the meaning of 43 CFR 3112.2–1(a).[3]

The State Officers ruled there was a failure of interested parties to make the required disclosures because of the "Pool Agreement for the Filing of BLM Entry Cards" entered into by the appellants on Mar. 18, 1978. Subsequent to that date, appellants' offers to lease were drawn with first priority in simultaneous oil and gas lease drawings in the several State Offices and in a number of cases oil and gas leases were issued. The State Offices have since determined from the agreement that (1) "all of the parties woud benefit from a lease when issued," (2) therefore they had a "joint interest" in each other's offers, and (3) Paul H. Landis had an interest in all their offers. Further, the New Mexico State Office based rejection on the fact that appellants had affixed their names and addresses to their DEC's by means of a rubber stamp applied so that the information was not inserted on the "appropriate" lines.

The "Pool Agreement" states that it was entered into for the purpose of 'spread[ing] the expenses and costs incurred in filing entry cards and paying annual leases for oil and gas lotteries" and so that "Paul H. Landis [might] manage and advise as to the entering of said cards and selling of said leases and render other advisory services." The agreement provides for reimbursement of Landis as to all expenses deemed necessary and beneficial by him, including "all funds advanced" by him *for filing entry cards* or paying annual lease rentals, all consultant or expert fees, "all services rendered and all advice given" by him as to filing entry cards and negotiating the sale of leases and all office or clerical expenses incurred by him. All parties to the agreement "who may have their entry card drawn for annual leases * * * agree, jointly and individually, to pay all expenses that have been incurred by and through this Agreement * * * *from the pro-*

---

[2] 43 CFR Part 3100 was amended effective June 16, 1980. 45 FR 35156 (May 23, 1980). References herein are to 43 CFR Part 3100 (1979).

[3] The following cases were rejected for the reason that the drawing entry cards were deemed not "fully executed": IBLA Nos. 80–258, 260, 263, 264, 265, 266, 269, 270, 271, 528, 584, 601, 618, 675, and 786.

ceeds of the sale of any said lease, immediately upon receipt of said proceeds." (Italics added.)

Payment may also be made from receipts from the assignment of any lease or by "any other approved property or negotiable instrument" acceptable to Landis. Interest on funds advanced for the filing of entry cards and paying annual leases shall be paid at 12 percent per annum from the date of payment. Furthermore, the agreement provides that Landis can institute "liens or other legal means [to secure payment of] the debts incurred by and through this Agreement" if no payment is made "within thirty (30) days of the receipt of funds from the sale of any and all leases acquired by and through this Agreement." In addition, "any lease sold [is] subordinated to said lien or liens." Landis is to furnish detailed billings of all expenses on an annual basis.

Landis also has "the option of refusing payment of the annual lease fees * * * for the renewal of any lease he deems a high risk or otherwise unprofitable. In such event, Landis agrees to notify the winner-holder of the lease and to reassign said lease, thereby allowing said winner-holder to pay the annual lease fees and remove the lease from this Pool arrangement."

The addition of parties to the agreement is done only with Landis' written consent. Withdrawal by any member "as to the filing of entry cards" may be done "at any time."

Finally, Landis "makes no guarantee that those parcels or lots advised to be profitable for filing will be productive or saleable to any oil company or other person."

[1] The Departmental regulation as to "sole party in interest," 43 CFR 3102.7, provides that a separate statement signed by "other interested parties" and the offeror, "setting forth the nature and extent of the interest of each in the offer," and a copy of their written agreement must be filed "not later than 15 days after the filing of the lease offer." Failure to comply will result in rejection of the lease offer or cancellation of any lease issued pursuant to the offer. *Mildred A. Moss*, 28 IBLA 364 (1977), *sustained*, *Moss* v. *Andrus*, Civ. No. 78-1050 (10th Cir. Sept. 20, 1978).

The question for decision is whether in the case of each appellant there were "other interested parties" so that the appellant should have complied with the disclosure requirements of the regulation. "Interest" is defined as:

> Any claim or any prospective or future claim to an advantage or benefit from a lease, and any participation or any defined or undefined share in any increments, issues, or profits which may be derived from or which may accrue in any manner from the lease based upon or pusuant to any agreement or understanding existing at the time when the offer is filed.

43 CFR 3100.0-5(b).

In their statements of reasons for appeal, appellants contend that they do not have a "joint interest" in each other's offers and that the only advantage of the pool agreement is that "their cost of offering per lease is less because they have spread these costs." Furthermore, they argue that Landis has a "non-interest" in all their offers because he does not partake of the "speculative value" of a lease but is merely reimbursed for his expenses under a "credit arrangement." Appellants cite Board decisions involving leasing services wherein the leasing service was authorized by the offeror as sole and exclusive agent to negotiate the sale of any lease obtained, with an enforceable right to share in the profits of any sale. *E.g.*, *Frederick W. Lowey*, 40 IBLA 381 (1979), *appeal docketed*, Civ. No. 79-3314 (D.D.C. Dec. 7, 1979). In each of these cases we concluded that the leasing service held an "interest" in the lease offers. Appellants conclude that the pool agreement gave "no enforceable right * * * against any lease" to Landis or any party to the agreement and that therefore each of the named offerors is a sole party in interest. Appellants also cite several Board decisions involving leasing services wherein the leasing service selected lands, filed offers, and advanced funds on behalf of clients, entitling it to reimbursement. *See*, *e.g.*, *Geosearch, Inc.*, 39 IBLA 49 (1979); *D. E. Pack*, 30 IBLA 166, 84 I.D. 192 (1977). In each of these cases we held that the offeror was a sole party in interest because the offeror was not obligated to transfer any interest in any lease issued to the leasing service.

In the cases herein, Landis has an interest in each of the lease offers made pursuant to the pool agreement. He advances funds for filing entry cards and paying annual lease rentals under the terms of the agreement. He is also entitled to impose an unspecified charge on the pool as a "consultation fee," plus a general charge for office and clerical expenses. He is entitled to be reimbursed with interest *from the proceeds of the sale or assignment of any lease issued*, for which he may secure payment by "liens or other legal means." This is participation in the issues or profits which may accrue "in any manner" from the lease and is an "interest" within the meaning of 43 CFR 3102.7. 43 CFR 3100.0-5(b).

This case is distinguished from such cases as *D. E. Pack*, *supra*, and *Geosearch, Inc.*, *supra*, by the fact that under the agreement Landis has a contractural right to be reimbursed with interest from the proceeds of the sale of any lease issued, and not a general right of repayment. The cumulative debt owed to Landis by the pool is not required to be apportioned to the specific lease or offer or particular pool member for which it was incurred. The proceeds from any lease of any member can be used by Landis to reduce or discharge the debt owed to him by all the members for services rendered in connection with all the offers and leases involved.

Further, the parties to the pool agreement have a joint interest in each other's offers made pursuant to the agreement by virtue of the fact that under the agreement Landis is reimbursed for the expenses incurred in filing their entry cards and paying their rentals from the proceeds of the sale of *any* lease issued, for which he may secure payment by "liens or other legal means." The proceeds from the sale of any lease issued constitute a central pool in which each party participates. This clearly is participation in the profits which may accrue "in any manner" from the lease and is an "interest" within the meaning of 43 CFR 3102.7. 43 CFR 3100.0–5 (b).

Appellants' contention that the pool agreement gave no enforceable right against any lease to Landis or any party to the agreement is incorrect. Pool members may withdraw only as to the filing of new entry cards. The definition of "interest" is broad. It includes legally enforceable rights, claims, *see H. J. Enneroldsen*, 44 IBLA 70, 86 I.D. 643 (1979), and participation in profits. 43 CFR 3100.0–5(b).

Accordingly, appellants should have compiled with the disclosure requirements of 43 CFR 3102.7 as to "other interested parties" when they filed their lease offers, and the State Offices were required to reject their lease offers and cancel their leases.

[2] The regulation as to "multiple filings," 43 CFR 3112.5–2, provides:

> **When any person, association, corporation, or other entity or business enterprise files an offer to lease for inclusion in a drawing, and an offer (or offers) to lease is filed for the same lands in the same drawing by any person of partly [*sic*] acting for, on behalf of, or in collusion with the other person, association, corporation, entity or business enterprise, under any agreement, scheme, or plan which would give either, or both, a greater probability of successfully obtaining a lease, or interest therein, in any public drawing, held pursuant to § 3110.1–6(b), all offers filed by either party will be rejected. Similarly, where an agent or broker files an offer to lease for the same lands in behalf of more than one offeror under an agreement that, if a lease issues to any of such offerors, the agent or broker will participate in any proceeds derived from such lease, the agent or broker obtains thereby a greater profitability of success in obtaining a share in the proceeds of the lease and all such offers filed by such agent or broker will also be rejected. Should any such offer be given a priority as a result of such a drawing, it will be similarly rejected. In the event a lease is issued on the basis of any such offer, action will be taken for the cancellation of all interests in said lease held by each person who acquired any interest therein as a result of collusive filing unless the rights of a bonafide [*sic*] purchaser as provided for in § 3102.1–2 intervene, whether the pertinent information regarding it is obtained by or was available to the Government before or after the lease was issued.**

In their statements of reasons for appeal appellants contend that

Landis is not an "agent or broker" filing offers to lease on behalf of others but merely "a supplier of information and a lender of funds." The pool agreement, however, provides for reimbursement of Landis' expenses of filing entry cards, payment of rentals, administration and sale of leases, and a consulting fee for his services, with accrued interest. The interest of Landis comes within the intent of the regulation. By virtue of more than one offer filed pursuant to the agreement for a particular parcel, he has a "greater probability of success in obtaining a share of the proceeds" of any lease issued. Furthermore, Landis "will participate in any proceeds derived from" any lease issued.

Moreover, by virtue of the joint interest which all the parties to the pool agreement have in each other's lease offers, the filing of any two offers for the same parcel by any parties to the agreement constituted multiple filings within the meaning of 43 CFR 3112.5-2. The profits from any lease acquired could be used to reduce the debt owed collectively to Landis by all members of the pool. The agreement gave them a greater probability of success in obtaining an interest in any lease issued.

Under the multiple filing regulation, the State Offices were required to reject the lease offers and cancel the leases issued.

[3] Regarding appellants' drawing entry cards, it was recently held in *Bessie B. Landis*, 48 IBLA 354 (1980), that a drawing entry card for a simultaneous oil and gas lease drawing need not be rejected under 43 CFR 3112.2-1(a) where the offeror's name and address are affixed with a rubber stamp outside the preprinted boxes but are otherwise legible on the face of the card. This is the case here. Until required by additional use of computers, efficient administration of the leasing program is not jeopardized thereby. Accordingly, we hold to our decision in *Landis* and modify the applicable decisions.[4] *See Brick* v. *Andrus*, Civ. No. 79-1766 (D.C. Cir. June 6, 1980); *Winkler* v. *Andrus*, 594 F.2d 775 (10th Cir. 1979).

Appellants have also raised a number of other peripheral issues. They indicate that Judith A. Lawton and Willis L. Lawton, Jr., were never signatory parties to the pool agreement. The Colorado State Office notes that it was informed by these parties that "their filings were pursuant to oral agreements" and that when asked as to the nature of such agreements they submitted copies of the pool agreement. BLM accordingly "assumed" that the Lawtons' filings were made pursuant to the pool agreement. In the alternative, the State Office would reject the Lawtons' offers for failure to "completely and accurately" respond to requests for additional information prior to issuance of the leases.

---

[4] The modified decisions are listed in n.3.

By their own admission the Lawtons apparently orally agreed to be bound by the written pool agreement, in which they were named parties. The fact that the agreement was oral makes no difference in deciding whether there has been a violation of the regulations. *H. J. Enevoldsen, supra* at 82.

Appellants also state that lease NM 33390 was issued to Wayne E. DeBord prior to his entrance into the pool agreement. The State Office decision indicates that the lease was issued as a result of a drawing on May 5, 1978, while the pool agreement is dated Mar. 18, 1979. This was a typographical error as is evident from the correct date—Mar. 18, 1978—on the face of the agreement included in the record. We also note that an agreement entered into by the parties on Sept. 10, 1979, identical to the Mar. 18, 1978, agreement, confirms "the oral agreements which have been in existence since the 1st day of August 1976."

Appellants also point out that the lease offer for lease NM 33424 made by Diane M. Weeks was rejected before a copy of the pool agreement had been submitted to the State Office. A "*Notice*" dated June 19, 1979, sent to the offeror drawn with third priority indicated that the lease would be issued to the offeror drawn with second priority. The record shows that the lease was erroneously issued "to the No. 2 drawee prior to the conclusion of the adjudication of the No. 1 drawee's offer to lease." This lease was properly canceled pursuant to the decision dated July 17, 1979.

Lease NM 36319 was canceled partly because Paul H. Landis' filings as attorney-in-fact for Bessie B. Landis and on his own behalf were held to constitute a multiple filing. The mere fact that Landis filed as attorney-in-fact for someone else and on his behalf does not per se constitute a multiple filing. He must have had an "interest" within the meaning of 43 CFR 3100.0–5(b) in the offer which he filed as attorney-in-fact. We have held, *supra*, that Landis had an interest in each of the lease offers made pursuant to the pool agreement. We also note that there is some question as to whether there has been compliance with 43 CFR 3102.6–1(a)(1) and (2).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed as modified.

Joseph W. Goss
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Douglas E. Henriques
Administrative Judge

APPENDIX A

IBLA Nos.	Name of Appellants	Lease Nos.
80-209	Wayne E. DeBord	C 27969
	Ilean M. Landis	C 28092 Acq.
	Judith A. Lawton	C 28108 Acq.
	Willis L. Lawton, Jr	C 28142
		C 28150
80-210	Vincent J. Landis	M 44841
	Henry E. Cobb	M 45104
80-258	Terrie K. DeBord	NM A 38354
		NM 25868
		NM 35891
80-260	Kristie R. Cobb	NM 36154
		NM 33930
80-263	Vickie Landis	NM 36569
80-264	Paul H. Landis	NM 35366
		NM 36319
80-265	Diane M. Weeks	NM 33424
	Terrie K. DeBord	NM 36568
80-266	Wayne E. DeBord	NM 33390
80-269	Dan L. Morgan	NM A 35616
80-270	Vincent J. Landis	NM 33435
80-271	Henry E. Cobb	NM 33678
80-528	Judith A. Lawton	NM 37859
80-584	Terrie K. Landis	NM 33914
80-601	Wayne E. DeBord	NM 39092
80-609	Judith A. Lawton	NM A 39654 TX
80-618	Vickie J. Landis	NM 39090
80-675	Vickie J. Landis	NM 36410
80-786	Paul H. Landis	NM 39068
	Wayne E. DeBord	NM 39089

U.S. GOVERNMENT PRINTING OFFICE : 1980 O - 330-188 : QL 3

best copy available

U.S. STEEL CORP.*

50 IBLA 190

Decided *September 30, 1980*

Appeals from decisions of the Utah State Office, Bureau of Land Management, requiring reimbursement of costs incurred in processing rights-of-way applications. FJ 14 U-35675 through U-35680.

Affirmed in part, reversed in part, and remanded.

1. Federal Land Policy and Management Act of 1976: Rights-of-Way—Rights-of-Way: Applications—Rights-of-Way: Federal Land Policy and Management Act of 1976

The Federal Land Policy and Management Act of 1976 authorizes the Bureau of Land Management to recover reasonable costs including costs of environmental analyses for applications of rights-of-way across public lands.

2. Federal Land Policy and Management Act of 1976: Rights-of-Way—Rights-of-Way: Applications—Rights of-Way: Federal Land Policy and Management Act of 1976

Costs not directly associated with processing or monitoring of a right-of-way application, such as evaluation of the mine to be served by the rights-of-way, are not authorized by the Federal Land Policy and Management Act of 1976 and are not reimbursable pursuant to 43 CFR 2802.1-2.

3. Accounts: Fees and Commissions—Accounts: Payments—Rights-of-Way: Applications

Management overhead costs are not a reimbursable cost recoverable from right-of-way applicants under 43 CFR 2802.1-2.

APPEARANCES: Erie V. Boorman, Esq., Parsons, Behle & Latimer, Salt Lake City, Utah, for appellant.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

INTERIOR BOARD OF LAND APPEALS

United States Steel Corp., appeals from decisions of the Utah State Office, Bureau of Land Management (BLM), requiring reimbursement of costs of processing right-of-way applications.

On Nov. 9, 1976, appellant made application for five rights-of-way over Federal land to service the B-Canyon Coal Mine Project in Utah. Appellant's applications were for a telephone line (U-35676), tram road (U-35677), railroad (U-35678), water pipeline (U-35679) and powerline (U-35680) rights-of-way. In addition, appellant applied for a special land use permit (SLUP) covering 480 acres to be used as the site for the surface facilities and buildings to support the mining operation. Appellant submitted a total of $2,260 with the applications pursuant to 43 CFR 2802.1-2(a)(3).

By letter of Feb. 1, 1977, appellant was notified that the statutes under which the applications were made had been repealed by secs. 705(a) and 706(a) of the Federal

---

*Not in chronological order.

Land Policy and Management Act of 1976 (FLPMA), 90 Stat. 2792–93. Appellant was informed that processing of the right-of-way applications would continue under the authority and requirements of Title V of FLPMA, 43 U.S.C. §§ 1761–71 (1976). Appellant specifically stated that it had no objection to amending the applications to conform to FLPMA. BLM informed appellant that, while processing of the SLUP would continue under FLPMA, BLM would hold the application until regulations concerning temporary use permits are promulgated.

On Feb. 9, 1977, BLM informed appellant that it is required to reimburse the United States for the cost of processing right-of-way permit appplications, including preparation of reports and statements concerning the impact of the proposal upon the environment. The letter states that it was issued in accordance with 31 U.S.C. § 483a (1976), FLPMA, and 43 CFR Subpart 2802. The letter continues:

> Based on available information and today's prices, the total estimated cost for processing the rights-of-way associated with your project is $50,000.
>
> As required by 43 CFR 2802.1–2(a)(4), we estimate our initial costs for February 1, 1977 through April 30, 1977, to be $27,260.00. Therefore, a bill for $25,000 is enclosed to cover our costs less $2,260 paid as filing fees.

Appellant paid the $25,000 and filed a notice of appeal as provided for in the letter of Feb. 9, 1977. On Sept. 1, 1977, BLM wrote appellant a letter to explain the new requirements for reimbursement of Federal
costs incurred with the processin
of right-of-way applications. Refe
ence was made to P.L. 95–2
91 Stat. 61 (May 4, 1977) and P.I
95–74, 91 Stat. 285 (July 26, 1977
which provide for the expenditu
of funds collected under secs. 30
(a), 304(b), 305(a), and 504(g) o
FLPMA, 43 U.S.C. §§ 1734, 173
and 1764 (1976). A new accountin
system, commencing Oct. 1, 197
was established to process the fund
The letter stated that all cost reco
erable work can be funded onl
from the new account. The lette
went on to state: "This means tha
the deposits must be on hand to pa
for the work *or the work must sto*
because BLM has no other fundin
source." (Italics in original.) Ap
pellant was billed $10,000 for esti
mated costs for the period Oct. 1
through Dec. 31, 1977. Appellan
paid the amount and filed a secon
notice of appeal.

On Mar. 17, 1978, appellant wa
billed $5,000 for what was describe
as "costs for on-going situation
processing of the draft environmen
tal impact statement and processin
of rights-of-way associated wit
this project." The letter stated tha
unless the payment is received, a
work on the B-Canyon Coal Min
Project will cease. Appellant pai
the $5,000 and filed a third notice o
appeal.

On appeal, appellant objects t
all of the required payments, excep
the $2,260 paid as filing fees. Th
validity of the regulations an
BLM's authority under the regulations to require appellant to reim-

burse the United States for the costs of processing the right-of-way applications are challenged by appellant on a number of grounds. Appellant specifically argues that:

(1) The decisions are unauthorized by any valid existing regulation and are therefore invalid.

(2) The decisions are based upon improper, invalid, or an absence of standards used in setting the amount.

(3) The amount was determined in an arbitrary and capricious manner or inconsistent with applicable law and therefore constitutes an abuse of discretion.

(4) The recovery of costs relating to environmental studies constitutes an unreasonable fee or tax in violation of 43 U.S.C. §§ 1371 and 1374 (1976).

(5) The amount is excessive and therefore unreasonable in violation of 43 U.S.C. §§ 1371 and 1374 and therefore not fair and equitable in violation of 31 U.S.C. § 483a (1976).

(6) The decisions are invalid in that a large portion of the costs incurred is for environmental analyses which are incurred for the benefit of the general public, not for the exclusive benefit of appellant and therefore constitute an invalid tax.

(7) The cost of monitoring the rights-of-way benefits the general public and is therefore an invalid tax.

(8) The indirect costs are invalid either as costs benefiting the public generally or as management overhead which is not recoverable.

(9) The charges for mine plan evaluation are neither authorized by statute nor reasonably related to the processing of the right-of-way applications.

[1] Regulation, 43 CFR Subpart 2802, amended in 1975 to require right-of-way applicants to bear the costs associated with processing of a right-of-way application was initiated under the authority of the Independent Offices Appropriations Act of 1952, 31 U.S.C. § 483a (1976). Sec. 304 of FLPMA, 43 U.S.C. § 1734 (1976), specifically authorizes the Secretary of the Interior to establish "reasonable filing and service fees and reasonable charges, and commissions with respect to applications." Sec. 304(b) provides:

> The Secretary is authorized to require a deposit of any payments intended to reimburse the United States for reasonable costs with respect to applications and other documents relating to such lands. The moneys received for reasonable costs under this subsection shall be deposited with the Treasury in a special account and are hereby authorized to be appropriated and made available until expended. As used in this section "reasonable costs" include, but are not limited to, the costs of special studies; environmental impact statements; monitoring construction, operation, maintenance, and termination of any authorized facility; or other special activities. In determining whether costs are reasonable under this section, the Secretary may take into consideration actual costs (exclusive of management overhead), the monetary value of the rights or privileges sought by the applicant, the efficiency to the govern-

> ment processing involved, that portion of the cost incurred for the benefit of the general public interest rather than for the exclusive benefit of the applicant, the public service provided, and other factors relevant to determining the reasonableness of the costs.

The cost recovery provisions of secs. 304 and 504(g) of FLPMA were implemented by Secretarial Order No. 3011, 43 FR 55280 (Oct. 14, 1977). The Secretarial order stated that the implementation shall apply to all appplications for rights-of-way over public lands which were pending on Oct. 21, 1976, or which have since been filed. The regulations at 43 CFR 2802.1–2 were specifically made applicable to applications for rights-of-way.[1]

Appellant's assertions that the regulations are invalid, that the recovery of costs relating to environmental studies constitutes an unreasonable fee or tax, and that the portion of the costs incurred for environmental analyses and monitoring of the rights-of-way benefits the general public rather than appellant and is therefore invalid, have been addressed and answered by the Court of Appeals for the Tenth Circuit in *Alumet* v. *Andrus*, 607 F.2d 911 (1979). In *Alumet* the court stated:

> Clearly, FLPMA is an express legislative mandate that all reasonable costs incurred by the Secretary in processing an application for rights-of-way on public lands shall be chargeable against the applicant for such rights-of-way, and further, that "reasonable costs" include, among other things, the costs of environmental impact statements. We shall assume that Congress was aware of its limitations in delegating the authority to "tax."

607 F.2d at 916.

The *Alumet* court did not address the issue of whether the full costs of an environmental statement (EIS) can be recovered from a right-of-way applicant. The court overturned the rule of the district court below that sec. 304 of FLPMA did not authorize the Secretary of the Interior to seek reimbursement from an applicant for *any* part of the costs of preparing an EIS. In *Colorado-Ute Electric Ass'n, Inc.*, 46 IBLA 35 (1980),[2] this Board following *Miss. Power & Light* v. *U.S. Nuclear Regulatory Comm.*, 601 F.2d 223 (5th Cir. 1979), *cert. denied*, 100 S.Ct. 1066 (1980), held that BLM may recover the full costs of preparing environmental studies associated with right-of-way applications. Although neither *Colorado-Ute* nor *Miss. Power & Light* arose under FLPMA, the rationale of both cases is equally applicable in this instance. The environmental studies and reviews are an integral part of the right-of-way application and as such directly benefit the applicant in this instance.

Congress implemented the revolving account established in sec. 304

---

[1] Regulation 43 CFR Part 2800 was amended effective July 31, 1980. 45 FR 44518 (July 1, 1980). The reimbursement of costs section of the amended regulation is virtually unchanged from the regulation promulgated in 1975. Application of the amended version of the regulation to the facts presented by this appeal would not benefit appellant. *See Henry Offe*, 64 I.D. 52, 55–56 (1957). It should be noted that order No. 3011 expired, by its own terms, when regulations were promulgated.

[2] Appeal pending, No. 80C–500 (D. Colo. Apr. 16, 1980).

(b) of FLPMA through the Department of the Interior and Related Agencies Appropriations Act for fiscal year 1978, P.L. 95–74, 91 Stat. 285 (1977). The moneys collected under secs. 304(a), 304(b), 305(a), and 504(g) of FLPMA, are the only funds appropriated by Congress for processing right-of-way applications. This process of appropriation has been continued through fiscal year 1980 and is the only source of funds available for preparation of environmental impact statements associated with rights-of-way over Federal lands.

[2] Appellant contends that the charges for mine plan evaluation are neither authorized by statute nor reasonably related to the processing of the right-of-way applications. The record shows in the "calculation of costs" that mine plan evaluation comprises some $10,000 of the $50,000 total estimated costs. Appellant's contention on this point has merit. While recovery of all costs associated with right-of-way applications including the costs of preparing environmental studies is mandated by FLPMA, the same does not hold true for the cost associated with evaluating the base operation that the rights-of-way will serve which in this instance is the mine itself. 30 CFR 211.10 authorizes the regional director of the Office of Surface Mining to review and consider a proposed mining plan. To the extent that BLM was involved in evaluating the mine plan under 43 CFR Subpart 3041 (1978) [3] such review is not reimbursable under the right-of-way regulations since it does not pertain to the right-of-way application. The amount contributed to mine plan evaluation is to be refunded to the appellant pursuant to sec. 304 (c) of FLPMA, 43 U.S.C. § 1734 (c) (1976).

Appellant asserts that the calculation of costs was either determined in an arbitrary and capricious manner and/or based upon improper and invalid standards. The Feb. 9, 1977, BLM letter lists the following costs that are reimbursable:

> 1. Salary, per diem, and travel of all personnel involved in actual processing of applications, such as record keeping, field examination, adjudication, Environmental Analysis Reports/Environmental Impact Statements, etc.
>
> 2. Costs of contracts, fees of consultants, costs of public meetings and hearings, and costs of other special arrangements made to assist in the processing of the applications.
>
> 3. Purchase and hire of special materials and equipment, including photos, maps, data, etc.
>
> 4. Extra incremental costs incurred for accelerating planned cadastral surveys, Management Framework Plans, and field examinations for the benefit of the applicant.

The above costs are the type of costs contemplated by FLPMA and the implementing regulations. The amount charged is only that amount necessary to evaluate the right-of-way applications pursuant to FLPMA. There is no indication that BLM has utilized money from the revolving fund for other than proper purposes. It was not intended that there be a standard used in setting the amount, rather it was intended that the applicant bear the full costs of processing the right-of-way application.

---

[3] Regulation 43 CFR Subpart 3041 was deleted in its entirety and its provisions transferred to 30 CFR Chap. VII, 30 CFR Part 211, and 43 CFR Part 3460. 44 FR 42650 (July 19, 1979), *corrected* 44 FR 56340 (Oct. 1, 1979).

[3] Appellant also challenges the indirect costs assessed against it as either invalid as costs benefiting the public generally or invalid as management overhead which is not recoverable by statute. The record does not show that indirect costs were factored into the computation of the amount of assessable costs billed to appellant, however, Organic Act Directive No. 77–65 dated Aug. 12, 1977, provides that "billings for costs recoverable work to be performed during the remainder of FY 1977 will continue to include 22% of direct costs to finance the applicable share of indirect costs." As was the case in *Colorado-Ute, supra*, we are unable to determine whether indirect costs were charged to appellant, and if so charged whether a portion of the indirect costs was a charge for "management overhead" which is not permissible. Accordingly, we remand the case to BLM for a determination whether indirect costs were factored into the costs charged to appellant and whether any of those costs were charges for management overhead. Of course, no indirect costs of any kind would be allowable as a surcharge to the $10,000 charged to the mine plan evaluation.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed in part, reversed in part, and remanded for action consistent with this decision.

FREDERICK FISHMAN
Administrative Judge

WE CONCUR:

EDWARD W. STUEBING
Administrative Judge

DOUGLAS E. HENRIQUES
Administrative Judge

FORD MacELVAIN

50 IBLA 303

Decided *October 7, 1980*

Appeal from decision of the California State Office, Bureau of Land Management, declaring null and void 105 mining claims situated on the outer continental shelf and refusing to record the notices of location submitted for such claims. CA MC 62288.

Affirmed.

1. Mining Claims: Lands Subject to—Outer Continental Shelf Lands Act: Generally

The Outer Continental Shelf Lands Act *as amended*, 43 U.S.C. §§ 1331–56 (Supp II 1978), provides the exclusive authority for the development of minerals o the outer continental shelf. Mining claim situated on the outer continental shel assertedly located pursuant to the placer provisions of the general mining law, 30 U.S.C. §§ 35–36 (1976), must be declared null and void.

2. Mining Claims: Recordation

It is proper to refuse to accept notices of location of mining claims submitted for recordation pursuant to sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976), when the claims are null and void because they are filed for lands on the outer continental shelf.

APPEARANCES: James D. Bell, Esq., Jackson, Mississippi, for appellant.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

INTERIOR BOARD OF LAND APPEALS

Ford MacElvain has appealed from the Jan. 8, 1980, decision of the California State Office, Bureau of Land Management (BLM), declaring 105 mining claims null and void because they are situated on the outer continental shelf (OCS). The decision indicated that notices of location submitted for recordation pursuant to sec. 314 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744 (1976), were being returned.

The notices of location generally assert the claims were located in 1968 pursuant to the provisions in the general mining law relating to placer claims. 30 U.S.C. §§ 35, 36 (1976). Appellant contends that the lands were then public lands subject to the mining laws, and as such they remain available for appropriation under the general mining law of 1872. He further contends that if they are not available at the present time, it is only by virtue of FLPMA, passed in 1976, a date subsequent to the date of location of the claims.[1]

[1, 2] These arguments are clearly without merit. The Outer Continental Shelf Lands Act, *as amended*, 43 U.S.C. §§ 1331–56 (Supp. II 1978), provides the exclusive authority for the development of minerals on the outer continental shelf. 43 U.S.C. § 1332(a) (1976); *Lowe* v. *Union Oil Co. of California*, 487 F.2d 477 (9th Cir. 1973) *cert. denied*, 417 U.S. 931 (1974). Claims for mineral deposits on the outer continental shelf cannot be established under the general mining law, and such claims are therefore invalid. *Id.* Because the claims are clearly invalid, BLM properly refused to accept them for recordation under sec. 314 of FLPMA. 43 U.S.C. § 1744 (1976).[2]

---

[1] Presumably, he means the definition given to "public lands" by section 103(e) of FLPMA, 43 U.S.C. § 1702(e) (1976), which specifically excludes lands on the outer continental shelf.

[2] The BLM decision also noted that the subject lands are not subject to appropriation under the Oil Placer Act, Feb. 11, 1897, ch. 216, 29 Stat. 526 (1897). This holding was not contested by appellant. Although that statute was never specifically and directly repealed, it has effectually been supplanted by sec., 37 of the Mineral Leasing Act of Feb. 25, 1920, ch. 85, 41 Stat. 437, 451 (1920), which provided that deposits of certain minerals, such as oil, would be subject to disposition only as provided in the Mineral Leasing Act. Thus, no oil placer claims could be located after that Act under the mining laws. The fact that Congress made separate provision for OCS mineral leasing in the Outer Continental Shelf Lands Act makes clear that legislation regarding onshore minerals was not considered to extent to Federally owned offshore mineral deposits.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Joan B. Thompson
Administrative Judge

We concur:

Frederick Fishman
Administrative Judge

James L. Burski
Administrative Judge

DOYON, LIMITED

5 ANCAB 77

Decided *October 10, 1980*

Appeal from the Decision of the Alaska State Office, Bureau of Land Management F-19155-20.

Reversed in part; stipulation approved.

1. Alaska Native Claims Settlement Act: Definitions: Public Lands: Department of the Interior Instructions, 44 L.D. 513 (1916)

Construction and maintenance of an authorized Federal improvement on public lands under principles of Department of the Interior *Instructions*, 44 L.D. 359 (1915) and 44 L.D. 513 (1916), does not cause an appropriation of land affected and thus does not affect the right of selection by a Native corporation under the provisions of ANCSA.

2. Patents of Public Lands: Department of the Interior Instructions, 44 L. D. 513 (1916)

The Federal interest retained in an authorized improvement constructed and maintained under principles of *Instructions*, 44 L.D. 513 (1916), is limited to the improvement itself. The exception for the improvement is inserted in a patent for the purpose of giving public notice that the improvement is there; eliminating the improvement from the conveyance; and for assuring any attendan right of the Federal Government to g onto the land for purposes consisten with its ownership in the improvement

3. Alaska Natives Claims Settlemen Act: Definitions: Public Lands: De partment of the Interior Instructions 44 L.D. 513 (1916)

Inasmuch as the Federal interest in a improvement constructed and mai tained on public land pursuant to *I structions*, 44 L.D. 513 (1916), does n effect a segregation of, nor is it an i terest in, the land itself, but is limite to the improvement, it cannot be co sidered as a possible exception to bei "public land" within meaning of § 3((1) of ANCSA.

4. Alaska Native Claims Settleme Act: Definitions: Withdrawal for N tional Defense Purposes

Lands affected by construction and ma tenance of a linear pipeline under pr ciples of *Instructions*, 44 L.D. 513 (191 are not "lands withdrawn or reserv for national defense purposes" within meaning of the exception in § 11(a) of ANCSA.

5. Patents of Public Lands: Depa ment of the Interior Instructions, L.D. 513 (1916)

A notation on the land records of a L.D. 513 interest must be removed, no reservation of such interest can included on subsequent patents, when subject improvement is no longer nee or used for or by the United States.

6. Alaska Native Claims Settlement Act: Definitions: Public Lands: Department of the Interior Instructions, 44 L.D. 513—Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Settlement Approval

Where the record is uncontested and supports a factual finding that the United States no longer uses or needs an improvement pursuant to the principles of *Instructions*, 44 L.D. 513 (1916), the Board can accept a stipulation by the parties to remove the reservation of interest from a conveyance document.

APPEARANCES: Elizabeth S. Taylor, Esq., for Doyon, Ltd.; Shelley J. Higgins, Esq., Office of the Attorney General, for State of Alaska; M. Francis Neville, Esq., Office of the Regional Solicitor, for the Bureau of Land Management.

OPINION BY ALASKA NATIVE CLAIMS APPEAL BOARD

Summary of Appeal

Doyon, Ltd., appeals Bureau of Land Management decision to include in a Decision to Issue Conveyance reservation of the Haines-Fairbanks pipeline right-of-way, and of the right to operate and maintain the same so long as needed or used by the United States.

The issue decided is whether the Board will approve a stipulated agreement between Appellant, Doyon, Ltd., and the Bureau of Land Management that the pipeline right-of-way shall not be reserved to the United States in the conveyance document.

The right-of-way is noted on the public land records as a 44 L.D. 513 interest.[1] While both Doyon, Ltd. and the Bureau of Land Management agree that the reservation should be deleted from conveyance to Doyon, there is substantial disagreement both as to the effect of a 44 L.D. 513 interest, and the circumstances under which such an interest is terminated.

These disagreements raise questions of law which could prevent the Board from approving the stipulated agreement. For this reason, the Board rules on the questions of law raised in this appeal, prior to ruling on the stipulated agreement.

The Board determines that the Federal interest retained pursuant to *Instructions*, 44 L.D. 513, is limited to the improvement—in this case, the pipe itself—and therefore such interest does not cause any appropriation of the underlying land; that the Federal interest is not excepted from withdrawal or selection under ANCSA by either § 11(a)(1) or § 3(e)(1); and that the Federal interest retained pursuant to *Instructions*, 44 L.D. 513, terminates when the improvement is no longer needed or used for or by the United States. The Board concludes there are no legal impediments to approving the stipulated agreement and that the record of this appeal contains sufficient factual basis to support a conclusion that Federal use and occupation of the linear pipeline has ceased.

---

[1] 44 L.D. 513 notations are notations to the land records made by the Bureau of Land Management pursuant to *Instructions* set forth at page 513 of volume 44 of the Land Decisions issued on Jan. 13, 1916. Reference is also made to 44 L.D. 359 issued Aug. 31, 1915.

Therefore, the Board approves the parties' stipulation that the Haines-Fairbanks pipeline right-of-way shall not be reserved to the United States in the conveyance document to Doyon.

Procedural Background

On Apr. 2, 1975, Doyon, Ltd. (Doyon) filed selection application F–19155–20, *as amended*, under provisions of § 12(c) of the Alaska Native Claims Settlement Act (85 Stat. 688, 701; 43 U.S.C. §§ 1601, 1611(c) (1976 and Supp. I 1977)) for lands withdrawn pursuant to § 11(a)(1) for Native Village of Northway.

On June 23, 1978, the Bureau of Land Management (BLM) issued a Decision to Issue Conveyance (DIC) including land in T. 15 N., R. 19 E., C.R.M., affected by this partial decision. The DIC specified the grant of lands shall be subject to a reservation of the Haines-Fairbanks pipeline right-of-way, as follows:

> **The conveyance issued for the surface and subsurface estates of the lands described above shall contain the following reservations to the United States:**
>
> **1. That Haines to Fairbanks pipeline right-of-way, F–010143, fifty (50) feet in width, and all appurtenances thereto, constructed by the United States through, over, or up on the land herein described and the right of the United States, its agents or employees, to maintain, operate, repair, or improve the same so long as needed or used for or by the Unite States.**

On July 31, 1978, Doyon filed a Notice of Appeal. In its Statement of Reasons and Memorandum filed on Sept. 26, 1978, Doyon asserts several errors in the DIC including reservation of the Federal interest in the Haines-Fairbanks pipeline system right-of-way.

On Nov. 8, 1978, BLM filed an Answer which concedes the merit of Doyon's position regarding the 44 L.D. reservations. BLM states that the General Services Administration (GSA) claims a property interest in the entire pipeline right-of-way including the pump stations and the pipe itself.

On Dec. 15, 1978, BLM filed a supplemental answer agreeing with Doyon's contention "that the reservation of the [pipeline] right-of-way cannot be upheld on the basis of the 44 L.D. 513 notation alone." Further, BLM asserts that any interest can only be reserved in the United States pursuant to ANCSA under provision of § 3(e) or § 17 (b). BLM again states that GSA claims some manner of property interest in the pipeline right-of-way and requests the Board act appropriately.

On Dec. 20, 1978, the Board issued an order naming GSA as a necessary party to this appeal and giving that agency 30 days within which to respond to briefings of the parties relating to the Haines-Fairbanks pipeline right-of-way (F–010143). The GSA did not make an appearance in response to the Board's order.

On July 23, 1979, the Board ordered the issue of 44 L.D. 513 notation as it relates in this appeal of Haines-Fairbanks pipeline right-of-way, F-010143, to be segregated from the remaining issues, closed the record and set final briefing. In addition, specific inquiries were made to all parties relating to 44 L.D. 513 notation.

On Aug. 30, 1979, Doyon filed response and on Sept. 10, 1979, BLM filed response to Board's order of July 23, 1979.

On June 26, 1980, Stipulation was filed by BLM and Doyon in which it is agreed that "the Haines-to-Fairbanks Pipeline right-of-way, F-010143, shall not be reserved to the United States in the proposed conveyance of lands to Doyon, Limited."

Factual Background

Congress authorized construction of the Haines-Fairbanks petroleum products pipeline system by the Department of the Army on Sept. 28, 1951 (65 Stat. 336).

The United States and Canada entered into an agreement on June 30, 1953 (4 U.S.T. 2223 (1953); T.I.A.S. No. 2875) (U.S.-Canada Agreement), which authorized the construction of an oil pipeline system from Haines to Fairbanks, Alaska, passing through northwestern British Columbia and Yukon Territory. The purpose of the agreement was to maintain the pipeline system until such time as the Permanent Joint Board on Defense decided that there was no further need for the system.

On Jan. 20, 1953, the U.S. Army Corps of Engineers requested the District Land Office, Department of the Interior, that, pursuant to Departmental Instructions of Jan. 13, 1916 (44 L.D. 513), a notation be placed on the tract books of lands affected by the 50-foot right-of-way for linear pipeline from the border of Canada to Ladd Air Force Base, Alaska.

Land involved in this partial decision, *i.e.*, Sec. 34, T. 15 N., R. 19 E., C.R.M., was in the public domain at the time a 44 L.D. 513 notation for a 50-foot right-of-way was placed on the public land records by BLM on Jan. 22, 1953 (Fairbanks Serial 010143).

The Haines-Fairbanks products pipeline system was constructed during 1954–1955 and was fully operational by 1958. Construction and maintenance was thereafter performed by the U.S. Army Corps of Engineers for the Department of Defense.

In May of 1970, the Department of the Army determined that the pipeline system was no longer needed.

On June 17, 1971, the Assistant Secretary for the Department of Defense made the decision to declare the pipeline system excess.

The House Armed Services Committee approved this decision on Mar. 13, 1973.

On June 7, 1973, the Army through the Real Estate Division of the Alaska District, Corps of Engineers, filed a Preliminary Report of Excess concerning disposal of the system.

In August of 1973, the Army filed with BLM a notice of intention to relinquish the military withdrawal here in question.

On July 23, 1976, GSA determined the Haines-Fairbanks pipeline property, including the linear pipe, to be surplus after no need or authorized use of the entire pipeline system had been demonstrated by a Federal agency.

In October 1978, the U.S.-Canada Permanent Joint Board on Defense formally declared there was no further need for the pipeline system.

Decision

Negotiations between the governments of Canada and the United States culminated in an agreement on June 30, 1953, authorizing construction of the Haines-Fairbanks petroleum products pipeline system for the mutual defense of both countries. Federal interest in the pipeline system located on public lands in Alaska was protected either by withdrawals made by Public Land Order (PLO) [2] or under principles of *Instructions* by Department of the Interior in 44 L.D. 513.

This partial decision addresses the question of whether a Federal interest in the linear portion of the Haines-Fairbanks pipeline system, reserved in a DIC to Doyon under principles of Department of the Interior's *Instructions*, 44 L.D. 513, can be deleted from the conveyance document as a result of a stipulated agreement signed by Doyon and BLM?

By regulation 43 CFR 4.913(b), the Board must approve stipulations which require action or forbearance of action by the Department of the Interior. (*Appeal of Northway Natives, Inc.*, 4 ANCAB 247 (1980) [VLS 78-57].)

Approval of a stipulation by the Board is tantamount to a finding that there are no legal or factual impediments of record which would prevent resolution of the issues in the manner stipulated. In this appeal, the result stipulated is the deletion of a reservation of Federal interest from a decision to convey land pursuant to ANCSA.

While BLM and Doyon are in agreement that the DIC should contain no reservation of interest in the linear pipeline, the parties are in substantial disagreement as to the effect of a 44 L.D. interest as well as the circumstances under which a 44 L.D. 513 interest is terminated. The Board here rules on the questions of law raised in this appeal which would otherwise prevent the Board from approving the stipulation.

---

[2] This Board considered the effect of a PLO (for a pump station facility) along the pipeline system on lands selected by a Native village corporation under ANCSA. (*Appeal of Tanacross, Inc.*, 4 ANCAB 173, 87 I.D. 123 (1980) [VLS 78-51].) The Board concluded that PLO withdrawals for the pump station facilities along the pipeline were "lands withdrawn or reserved for national defense purposes" and were therefore excepted from withdrawal for selection under provision of § 11 (a)(1) of ANCSA. Because the issue of this partial decision does not include any lands withdrawn by PLO, the Board's decision in *Appeal of Tanacross, Inc., supra*, is inapplicable.

Both Doyon and BLM agree that the purpose of a 44 L.D. notation is to provide notice on public record of the Government improvement and to assure protection of the improvement by inserting a clause excepting the improvement in subsequent patents.

Doyon states that a 44 L.D. 513 interest causes neither a reservation nor a withdrawal of lands. Asserting that the pipeline has not been used for years, Doyon argues it has been actually abandoned as is evidenced by Notice of Intention to Relinquish filed by the Army, and as the right-of-way is inextricably related to the Federal improvement there can be no interest reserved.

Doyon stresses that the United States use and occupancy of the pipeline had terminated and any effect of 44 L.D. 513 ceased. Further, that the 44 L.D. 513 notation of Haines-Fairbanks pipeline was not for national defense purposes within exception of § 11(a)(1) of ANCSA since it was not a withdrawal by PLO.

BLM states that the principle underlying a 44 L.D. 513 *Instructions* is that the authorized construction of a Federal improvement by a Federal agency on public land *appropriates* the land used and occupied by the improvement.

While the BLM states that the appropriation exists only for so long as the improvements are used and occupied by the United States, BLM disagrees with Doyon's assertion of abandonment. BLM argues that a 44 L.D. improvement is a Federal interest in land which must be conveyed unless it comes within one of the exceptions of ANCSA. Concluding the pipeline reservation does not come within any of the exceptions, BLM states it must be conveyed.

To resolve these differences, it is useful to review the origin of 44 L.D. 513 *Instructions* and the result intended by the Department of the Interior.

Prior to 1915, when the Department issued the *Instructions* found in 44 L.D. 359, it found itself in a dilemma. The parameters of that dilemma are described in the case of *M. R. Hibbs*, 42 L.D. 408 (1913).

Hibbs had applied for land under the Act of June 11, 1906 (34 Stat. 233), which permitted homestead entry in a national forest in accordance with the general homestead laws. The Forest Service requested that a roadway crossing land applied for by Hibbs be reserved in his patent. The Department had previously ruled that such roadways could be reserved in patents issued pursuant to the homestead laws.

The entry laws under which Hibbs was entitled to obtain his patent no express provision for reservation of such a roadway nor did it authorize the insertion in patents of any conditions, restrictions or reservations not specifically provided for in existing laws.

The Department reconsidered its earlier ruling, and declared that it was without authority to insert any restrictions, limitations or reservations in a patent issued under homestead entry law unless specifically authorized to do so by statute. The underlying principle is that an agency cannot add restrictions to a patent unless authorized to do so by Congress when issuance of patent is mandatory upon an entryman's full compliance.

Since there was no provision in the statute allowing reservation of a roadway easement, no such reservation could be inserted in the patent. The Department added that since the easement could not be reserved, the alternative to assure protection of the Federal interest would be to exclude such affected land from entry.

The effect of the holding in *Hibbs, supra,*[3] was to preclude the Department from reserving a Federally-built improvement in a patent unless specifically allowed to do so by the statute under which entry is made and patent issued. The method used to protect such Federal improvements on public lands would be to exclude the affected land from entry.

The alternative—to exclude the improvement while conveying the land—resulted when the Department of the Interior issued *Instructions*, 44 L.D. 359, on Aug. 31, 1915. These Instructions were issued in response to a request by the Secretary of Agriculture to reserve telephone lines and right-of-way crossing lands within a national forest which had been entered under homestead laws. The Instructions were prefaced with a statement of the Department's problem of retaining the Federal interest in improvements constructed and maintained on lands open to entry under public land laws in view of prohibition to make such reservations as held in *Hibbs, supra,* as follows:

> The lands having been so devoted to a public purpose, pursuant to a law of Congress, subsequent disposition thereof will not, in the absence of an express conveyance by the United States, operate to pass title to the patentee to such telephone lines or the right of the United States to operate and maintain the same. On the other hand, under the circumstances of these cases, it seems unnecessary and inadvisable to reserve from disposition and eliminate from the entries and patents definite tracts or areas of land for the protection of such lines.

44 L.D. 359.

This statement reflects the Department's position that Federal interest in an authorized improvement constructed and maintained on public lands could not be disposed of without specific intent to do so, and, that such improvement appropriated the affected land in such manner that it was unavailable for entry consistent with the holding in *Wilcox, infra.*

---

[3] In *Solicitor's Opinion*, M-36071, 60 I.D. 477 (May 16, 1951), the Department of the Interior reiterated its position that: "Where a statute places upon this Department the mandatory duty of conveying lands to persons who meet certain requirements prescribed in the legislation, the Department cannot impose upon such persons additional requirements or convey to them rights less than those provided for by Congress."

It was the Department's expressed purpose in these Instructions to formulate a means of assuring retention of Federal ownership in an improvement constructed on public lands without causing any change of public land status.

> *It is believed that the solution of the matter is to convey all of the lands included within the area described in any such homestead entry, and all rights appurtenant thereto, except the property of the United States,* namely, telephone line and appurtenances and the right of the United States to maintain and operate the same so long as it shall be necessary. This may be accomplished by excepting the aforesaid property of the United States and the rights necessary and incident thereto from the conveyance. In other words, *instead of conveying the property subject to an easement, no conveyance should be made of the telephone line or rights appurtenant thereto.* [Italics added.]
>
> You [Commissioner of the General Land Office] are accordingly advised as follows: in cases where telephone lines or like structures have been actually constructed upon the public lands of the United States, including national forest lands, and are being maintained and operated by the United States, and your office is furnished with appropriate maps or field notes by the Department of Agriculture so prepared as to enable you to definitely locate the constructed line, proper notation thereof should be made upon the tract books of your office and if the land be thereafter listed or disposed of under any applicable public-land law, you should insert in the register's final certificate and in the patent when issued the following exception:
>
> "Excepting, however, from this conveyance that certain telephone line and all appurtenances thereto, constructed by the United States through, over, or upon the land herein described, and the right of the United States, its officers, agents, or employees to maintain, operate, repair, or improve the same so long as needed or used for or by the United States."

44 L.D. 359–360.

Instructions given on Jan. 15, 1916, in 44 L.D. 513, provided an elaboration of principles expressed in 44 L.D. 359, by extending this concept to protecting other types of Federal improvements made pursuant to authorized appropriation acts.

> I am of the opinion that the same reasoning as adopted in the Department's instructions of August 31, 1915, to the Commissioner of the General Land Office, relative to telephone lines constructed under authority of similar appropriation acts applies to the other kinds of improvements mentioned in the above act of March 4, 1915; and that similar exceptions as to lands needed for such improvements may be inserted in the register's final certificate, and in the patent when issued. * * * [T]he case should be one of either actual construction, or in which the evidence shows that the construction has been provided for, and will be immediately undertaken.

44 L.D. 513, 515.

The Board concludes the intended purpose of the Department of the Interior's *Instructions*, 44 L.D. 359, and in 44 L.D. 513 was, first, to assure retention of Federal ownership in authorized improvements constructed and maintained on public lands by excepting such improvement from an ensuing patent; and second, to assure that the continued existence and use of the Federal improvement would not prohibit conveyance of public lands.

The Board disagrees with BLM's contention that an authorized improvement protected by a 44 L.D. 513 notation causes an appropriation of land within the meaning of cited authorities. Such appropriation would effectively change the public land status and thereby prohibit conveyance under ANCSA.

BLM cites several authorities to describe the manner and effect of appropriation caused by a Federal improvement on public lands under *Instructions* found in 44 L.D. 513.

The landmark case of *Wilcox* v. *Jackson*, 38 U.S. (3 Pet.) 498 (1839), is cited by BLM as precedent for the principle that authorized acts of use and occupation by the Federal Government appropriates the affected land so that the land is severed from the public domain and is not subject to entry under the general land laws.

The case involved an attempt to gain title to land located in Fort Dearborn, Illinois. The Fort had been established by Act of 1804, and had been intermittently occupied and vacated as a military post over a period of years. Jackson and his predecessors in interest had, by claims of possession and of rights under preemption laws, sought ownership of a portion of the original military site. Although Jackson's attempts of entry would have been otherwise allowable, they were denied because of the prior appropriation.

The court found, that as a result of the congressional acts establishing the Fort, and the factual events which occurred on the land, the land had been appropriated by the Federal Government, stating:

> Now this is an appropriation, for that is nothing more nor less than setting apart the thing for some particular use.

38 U.S. 512. And further:

> But as we go farther, and say, that whensoever a tract of land shall have once been legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands; and that no subsequent law, or proclamation, or sale, would be construed to embrace it, or to operate upon it, although no reservation were made of it.

38 U.S. 513.

In *United States* v. *R. G. Crocker*, 60 I.D. 285 (1949), the Department of the Interior affirmed BLM's dismissal of a protest by the Forest Service against pending patents to mining claims. The Forest Service contended that the claims conflicted with an established administrative site. Appellant Crocker had filed application for mineral patent on land within a national forest which by statute were made available for mineral claims as though on public lands. Prior to the filing of these claims, the Forest Service had constructed structures and made improvements on a portion of an administrative site outside the limits of the mining claims. The Forest Service contended that any mining claim in conflict with the administrative site should be denied, though none of the land had been withdrawn from mineral location.

The Department found that the portion of the administrative site within the mining claim limits was unimproved and not exclusively and continuously occupied by Government structures or personnel. Since the issue in dispute involved only the unimproved portion of the Forest Service administrative site the Department held that the unimproved land was not withdrawn from mining location by virtue of any use by the Forest Service.

However, the Department left no doubt that had the mining claims been in conflict with portions of the administrative site on which Forest Service's improvements were located, the lands would have been so firmly appropriated as to preclude any mining location on land occupied by those structures.

The Forest Service also protested issuance of mining patents to Crocker because of a 44 L.D. 513 interest in existing telephone lines and a constructed roadway on lands covered by the mining claims. Rather than deny issuance of mining claim patent to Crocker, BLM held that these Federal improvements would be *excepted* from the patent, if issued, in accordance with *Instructions*, 44 L.D. 359 (1915).

In *United States* v. *Schaub*, 103 F. Supp. 873 (D.C. Alaska 1952), *aff'd*, 207 F.2d 325 (9th Cir. 1953), the court held that Forest Service had made such an appropriation of land by improvements and use of a gravel pit in a national forest as to preclude the filing of mining claims. Schaub had filed a mining claim, allowable as on public land generally in the national forest, on a gravel site which had been used intermittently by the Forest Service for road building purposes for some years prior to the filing. The court asserted such use by Forest Service was in furtherance of lawful obligations and that such use was itself notice of actual possession. The court found that even though the lands had not been withdrawn from entry, any mining claims would be invalid due to the proper appropriation caused by use and occupation by the Forest Service.

In *A. J. Katches*, A-29079 (1962), the Department held that prior construction of a lookout tower and road by the Forest Service, in a national forest, appropriated the lands and they were thereafter not subject to location under mining laws. The Department found only the extent of such appropriation would be subject to additional hearing.

In the case of *A. W. Schunk*, 16 IBLA 191 (1974), the Forest Service contested the validity of mining claims as being in conflict with a transmission line right-of-way permit issued to a private utility. The permit was issued under statutory provision which expressly stated that such permit could confer no interest in the land and did not close the land to operation of general land laws.

BLM found that Schunk's mining claims did conflict with the property covered by the transmission right-of-way and were therefore invalid, reciting such decision to be in accordance with principles contained under *Instructions*, 44 L.D. 513.

The Department found the terms of such permit to be nonexclusive and affirmed adherence to doctrine of appropriation of land by Government occupation and use which prevented operation of general land laws as in *Wilcox* v. *Jackson*, *supra*, and in *Schaub*, *supra*. While stating such doctrine formed the basis for 44 L.D. 513, the Department at the same time, asserted that Government improvements did not withdraw the land, rather such improvements were to be noted and excepted from the patent as in *Crocker*, *supra*.

The Department held that Schunk's mining claims could not be found invalid on basis of 44 L.D. 513, as the permit was issued to a private utility which could not be deemed use and occupation by the Government within the ambit of these Instructions. The Board did note that, in any event, the protection for the improvement could be no more than that noted in *Crocker*, *supra*, *i.e.*; the improvement to be noted and excepted from an ensuing patent while not affecting the land.

The above cases consistently hold that even in the absence of a formal land withdrawal an authorized use and occupancy, which has been factually established by structures or other physical improvements on public land by a Federal agency, appropriates the affected land in a manner tantamount with being an interest in the land itself. Such an appropriation precludes the right of entry or claim which would be otherwise allowable under the general public land law.

The only case in which the effect of a 44 L.D. 513 notation was an actual issue in dispute clearly holds to the contrary. *Crocker*, *supra*, states that an improvement classified under a 44 L.D. 513 notation does not appropriate an interest in the land, but rather is a procedure whereby the improvement is expected from ensuing patents.

The term "appropriation" as used in the cases cited by BLM has a meaning analogous with the terms "withdrawn" or "reserved" insofar as the result is to segregate the land from entry. The result of such "appropriation" in these cases is that the previous land status has effectively been altered and lands affected thereby are no longer available for entry or claim.

The effect of an improvement constructed pursuant to *Instructions*, 44 L.D. 513, is clearly distinguishable because, by the terms of the Instructions, the improvement cannot infringe upon the interest of land ownership otherwise available under applicable public laws. Any contrary result would be anthesis to the reason for formulation of *Instructions*, 44 L.D. 513, as described previously.

[1] Construction and maintenance of an authorized Federal improvement on public lands under principles of Department of the In-

terior *Instructions*, 44 L.D. 359 and 44 L.D. 513, does not cause an appropriation of land affected and thus does not affect the right of selection by a Native corporation under the provisions of ANCSA.

The requirement that an appropriate notation be placed on BLM's land status maps provides procedural notice of Federal ownership in the improvement. Neither the notation nor the improvement effects the status of the land.

[2] The Federal interest retained in an authorized improvement constructed and maintained under principles of *Instructions*, 44 L.D. 513, is limited to the improvement itself. The exception for the improvement is inserted in the patent for the purpose of giving public notice that the improvement is there; eliminating the improvement from the conveyance; and for assuring any attendant right of the Federal Government to go onto the land for purposes consistent with its ownership in the improvement.

Because the interest retained under *Instructions*, 44 L.D. 513, is limited to the improvement, it is only the improvement that can be excepted from the patent.

Therefore, aside from the question of whether the Board can accept the stipulation to delete the reservation in the DIC, the Board finds that the BLM erred in describing the interest in the DIC. The conveyance purports to "reserve" to the United States the "Haines to Fairbanks pipeline right-of-way, F–010143, fifty (50) feet in width." [4]

A Federal interest retained pursuant to *Instructions*, 44 L.D. 513, can only be excepted, rather than reserved, from the conveyance document; and the interest excepted is limited to the improvement and its appurtenances. The language of the DIC properly retains the right of the United States to go onto the land as necessary to perform all rights and obligations of ownership of the improvement. The record of this appeal shows that other sections of the Haines-Fairbanks pipeline have been excepted from patents in the manner consistent with this ruling.[5]

As to the question of whether the interest in the pipeline is an exception from the definition of "public lands" in § 3(e) of ANCSA, the Board concurs with BLM's conclusion that there is no basis for a § 3(e) determination. However, the Board disagrees with BLM's premise for this conclusion.

Sec. 3(e) defines public lands (available for selection by Native

---

[4] BLM regulations refer to the use of principles of *Instructions*, 44 L.D. 513, in 43 CFR, Subpart 2800, which is the General Right-of-Way section. The ruling that only the improvement can be excepted from ensuing patents does not conflict with this reference in the regulations.

[5] "Excepting however from this conveyance that certain pipeline and all appurtenance thereto, constructed by the United States through, over, or upon * * * and the right of the United States, its officers, agents, or employees to maintain, operate, repair or improve the same, so long as needed or used for or by the United States." (Doyon's Response to Order Closing Record (Haines to Fairbanks Right-of-way), dated 8–28–79, Exhibit A, p. 12, Patent No. 1229079 issued 10–11–62.)

Corporations) as "all Federal lands and interests therein located in Alaska except: (1) the smallest practicable tract, as determined by the Secretary, enclosing land actually used in connection with the administration of any Federal installation."

BLM states that the extended period of nonuse of this portion of the pipeline is sufficient to preclude making a § 3(e)(1) determination. Implicit in such argument is the premise that a 44 L.D. 513 interest is normally subject to a § 3(e) determination.

The Board has concluded that the effect of a Federal improvement constructed and maintained under *Instructions*, 44 L.D. 513, does not cause segregation of the land so as to prevent application of entry or claim under public land laws. It is the salient feature of the origin and purpose of *Instructions*, 44 L.D. 513, that the retained Federal interest be limited to the improvement itself which is to be excepted from the patent rather than be an interest in the land which would limit or restrict the patent. An improvement constructed by the Federal Government under a 44 L.D. 513 notation is not land and thus cannot be "land actually used" within the definition of § 3(e)(1).

[3] The Board finds that inasmuch as the Federal interest in an improvement constructed and maintained on public land pursuant to *Instructions*, 44 L.D. 513, does not effect a segregation of, nor is it an interest in, the land itself, but is limited to the improvement, it cannot be considered as a possible exception to being "public land" within the meaning of § 3(e)(1) of ANCSA.

The next question is whether the interest was excepted from withdrawal within the meaning of § 11(a)(1) of ANCSA, and therefore is not selectable under ANCSA.

The language of this section specifically excepts from withdrawal for selection by Native corporations, "lands withdrawn or reserved for national defense purposes."

In *Tanacross, Inc., supra*, the Board found that the pump stations for the pipeline, which had been withdrawn by PLO, came within the exception of § 11(a)(1) and therefore were not withdrawn for selection pursuant to ANCSA. Thus, the affected lands could not be selected, even though the Federal Government had excessed the pump stations. The Board ruled that at the time ANCSA withdrawals become effective, the PLO and the treaty establishing the national defense character of the PLO were in effect and that no auxiliary actions, such as procedures to excess, could defeat a PLO or change its character.

This Board, in *Paug-Vik, Inc., Ltd.*, 3 ANCAB 49. 56, 85 I.D. 229, 235 (1978). concluded that the terms "withdrawn or reserved" are used interchangeably for purpose of determining lands excluded from selection under § 11(a)(1) of ANCSA. It follows that if lands affected by a 44 L.D. 513 notation are neither withdrawn nor reserved, such lands do not come within the exception of § 11(a)(1).

[4] The Board therefore finds, in agreement with BLM and Doyon, that lands affected by construction and maintenance of a linear pipeline under principles of *Instructions*, 44 L.D. 513, are not "lands withdrawn or reserved for national defense purposes" within the meaning of exception to withdrawal of lands under § 11(a)(1) of ANCSA.

Having determined that a 44 L.D. 513 interest does not appropriate the land so as to bring it within the exceptions of either § 3(e)(1) or § 11(a)(1) of ANCSA, the question remains as to the means of terminating a 44 L.D. 513 interest.

Both Doyon and BLM agree, in general terms, that a 44 L.D. 513 interest fails under its own terms when the improvement ceases to be needed or used by the United States. Both agree that it is the fact of nonuse and lack of need that terminates the effectiveness of a 44 L.D. 513 interest, as opposed to the necessity for a formal revocation by the Secretary of the Interior to terminate the effectiveness of a PLO withdrawal.

The parties seriously disagree on the legal principles under which the pipeline interest should be terminated. Doyon argues actual abandonment, as evidenced especially by the decision to surplus the property by GSA in July of 1976. The BLM disagrees that a finding within the legal nuances of abandonment doctrine would be appropriate. BLM argues that the issue need not be resolved because of 44 L.D. 513 interest appropriates the land; all Federal interest in land must be conveyed within a § 11(a)(1) withdrawal unless such interest is excepted under other provisions of ANCSA; a 44 L.D. 513 interest does not fit within any of the exceptions; therefore it must be conveyed.

The Board does not accept BLM's argument, having ruled that a 44 L.D. 513 interest is not an interest in land. Since a 44 L.D. 513 interest is not an interest in land it is not conveyed under ANCSA, and must be excepted from patents issued under ANCSA unless it terminates by its own terms.

[5] The Board concurs with the parties and finds that a notation on the land records of a 44 L.D. 513 interest must be removed, and no reservation of such interest can be included on subsequent patents, when the subject improvement is no longer needed or used for or by the United States.

The Board concurs with BLM in that there is no necessity to rule on the doctrine of abandonment within the meaning of the cases cited. In this appeal, since BLM was signatory to a Stipulation (June 6, 1980) in which it was agreed that the Haines-Fairbanks pipeline right-of-way, F-010143, shall not be reserved to the United States in the proposed conveyance document, it is uncontested that the pipeline is no longer used for or by the United States. Therefore, no ruling is necessary on degree of evidence required to terminate a 44 L.D. 513 interest.

[6] The Board concludes that where the record is uncontested and supports a factual finding that the United States no longer uses or needs an improvement constructed pursuant to the principles of *Instructions*, 44 L.D. 513, the Board can accept a stipulation by the parties to remove the reservation of interest from a conveyance document.

The file record of this appeal documents various events which provide the basis for a factual determination as to whether all Federal interest in the linear pipeline has terminated pursuant to the *Instructions*, 44 L.D. 513.

The record discloses that in May 1970, the Army determined there was no further military requirement for supply through the Haines-Fairbanks pipeline system; the decision to excess the pipeline system was made in 1971; in 1973, the Army filed a Preliminary Report of Excess concerning disposal of the system; in 1976 the GSA determined the linear pipeline to be surplus; in 1978, the U.S.–Canada Permanent Joint Board on Defense, determined there is no further need for the Haines-Fairbanks pipeline.

Therefore, based on the file record of this appeal, the Board approves the Stipulation filed by BLM and Doyon on June 26, 1980, and Orders BLM to delete the reservation of the Haines-Fairbanks pipeline right-of-way, F–010143, from the DIC here appealed, and to make appropriate amendments to the land records involved.

This represents a unanimous decision of the Board.

Judith M. Brady
Administrative Judge

Abigail F. Dunning
Administrative Judge

Joseph A. Baldwin
Administrative Judge

CENTRAL OIL AND GAS, INC.

2 IBSMA 308

Decided *October 23, 1980*

Cross appeals by Central Oil and Gas, Inc., and the Office of Surface Mining Reclamation and Enforcement, from a Mar. 11, 1980, decision of Administrative Law Judge Sheldon L. Shepherd sustaining seven violations and vacating the remaining violation in Notice of Violation No. 79–III–17–26 (Docket No. IN 9–21–R).

Affirmed in part; reversed in part.

1. Surface Mining Control and Reclamation Act of 1977: Generally—Surface Mining Control and Reclamation Act of 1977: Previously Mined Lands

Where a surface coal mining operation affects previously mined lands, the fact that an alleged violation could have existed before the present operation does not relieve the permittee from responsibility for the violation.

2. Surface Mining Control and Reclamation Act of 1977: Roads: Generally

The exception clause in sec. 522(e)(4) of the Act is not intended to allow mining activity near the junction of a mine access or haul road with a public road;

its purpose is merely to allow access or haul roads to join public roads by excepting them from the setback requirement.

APPEARANCES: Rolland E. Laughbaum, Esq., Galion, Ohio, for Central Oil and Gas, Inc.; Mark Squillace, Esq., Stefan Nagel, Esq., and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Division of Surface Mining, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

Central Oil and Gas, Inc. (Central), and the Office of Surface Mining Reclamation and Enforcement (OSM) have each appealed from the Mar. 11, 1980, decision of Administrative Law Judge Sheldon L. Shepherd upholding violation Nos. 1, 2, 3, 4, 5, 7, and 8 of Notice of Violation No. 79-III-17-26 and vacating violation No. 6 of the same notice. For the reasons stated below, we affirm that part of the decision upholding the seven violations and reverse that part of the decision vacating the one violation.

Background

On Aug. 13, 1979, two OSM inspectors conducted an inspection of Central's surface coal mining operation in Jefferson County, Ohio.[1] Two inspectors returned to the site on Aug. 15, 1979, and following further inspection, issued Notice of Violation No. 79-III-17-26 pursuant to sec. 521(a)(3) of the Surface Mining Control and Reclamation Act of 1977 (Act).[2] The notice contained eight alleged violations.

On Nov. 10, 1979, Central applied for review of the notice. Following a hearing held in Steubenville, Ohio, on Feb. 27, 1980, Administrative Law Judge Shepherd issued his Mar. 11, 1980, decision. On Mar. 21, 1980, Central filed a notice of appeal with the Board seeking review of the seven violations sustained by the Administrative Law Judge. On Mar. 31, 1980, OSM filed a cross appeal of that part of the decision vacating one violation. The parties' briefs have been submitted.

Discussion

[1] Central's general response to all the violations charged in the notice was that the area in question had been the subject of mining for 40 years prior to the commencement of Central's activities in 1978 and, therefore, it could not be held liable because OSM failed to show who initially created the problems. This argument, per se, is without merit. Mining on previously mined lands did not relieve Central of its duty to comply with the initial regulatory program regulations.[3] Central

---

[1] The permit (No. C-869) covering this operation was issued by the State of Ohio on May 5, 1978.

[2] Act of Aug. 3, 1977, 91 Stat. 445, 30 U.S.C. § 1271(a)(3) (Supp. II 1978).

[3] The permit in this case was issued after the effective date of the Act. Sec. 502(c) of the Act, 30 U.S.C. § 1252(c) (Supp. II 1978), established the effective date as May 3, 1978. 30 CFR 710.11(a)(3)(ii) provides that "[o]n and after May 3, 1978, any person conducting coal mining operations shall comply with the initial regulatory program."

did not attempt to rebut any of the alleged violations by presenting evidence that might have alleviated its responsibility for those violations.[4] Central merely relied on cross-examination of an OSM inspector to elicit from him testimony that for some of the violations the conditions could have been created prior to May 3, 1978. Such a concession falls far short of rebutting a prima facie case that a violation existed on the date of inspection.

Since Central presented no independent evidence in this case, the issue for resolution is whether OSM presented sufficient evidence to establish a prima facie case as to each of the violations. *See Burgess Mining and Construction Corp.*, 1 IBSMA 293, 86 I.D. 656 (1979); *James Moore*, 1 IBSMA 216, 86 I.D. 369 (1979). Based on the testimony of the OSM witnesses and the photographs and documentary evidence produced by OSM at the hearing, we conclude that OSM met its burden of establishing a prima facie case that Central:

1. Mined within 100 feet of a stream in violation of 30 CFR 715.17(d)(3) (violation No. 1);
2. Failed to cover all exposed coal seams and acid-forming and toxic-forming materials in violation of 30 CFR 715.14(j) (violation No. 2);
3. Established a stream ford without regulatory authority approval in violation of 30 CFR 715.17(*l*)(2) (violation No. 3);
4. Failed to direct all surface drainage through a sedimentation pond prior to leaving the permit area in violation of 30 CFR 715.17(a) (violation No. 4);
5. Affected areas outside the permit area in violation of sec. 502(a) of the Act, 30 U.S.C. § 1252(a) (Supp. II 1978) (violation No. 5);
6. Failed to meet the effluent limitations for discharges from the area affected by its operation in violation of 30 CFR 715.17(a) (violation No. 7);[5]
7. Failed to mark topsoil storage piles in violation of 30 CFR 715.12(f) (violation No. 8).

[2] Violation No. 6 charged that Central had affected an area within 100 feet of the outside right-of-way of a public road in violation of sec. 522(e)(4) of the Act by storing topsoil in that area.[6] The Administrative Law Judge vacated that violation, concluding that OSM failed to establish a prima facie case. That conclusion was error. It was based in part on a misinterpretation of the exception language in

---

[4] A permittee who affects previously mined lands has the opportunity of making arrangements with the regulatory authority concerning its activities on such lands. *See, e.g.*, 30 CFR 715.14(b). Central apparently did not avail itself of that opportunity.

[5] The record indicates that the sampling done by OSM to support this violation was accomplished at two locations off the permit area (Tr. 34; Exh. R–6). While the best evidence to support a violation of this nature would be an analysis of a sample which was taken at the point of discharge from the permit area, Central presented no evidence that the effluent limitations were any different at the permit boundary than at OSM's sampling locations.

[6] Sec. 522(e)(4) (30 U.S.C. § 1272(e)(4) (Supp. II 1978)) reads in pertinent part:

"After August 3, 1977, and subject to valid existing rights no surface coal mining operations except those which exist on August 3, 1977, shall be permitted—

* * * * *

"(4) within one hundred feet of the outside right-of-way line of any public road, except where mine access roads or haulage roads join such right-of-way line."

sec. 522(e)(4). The exception is not intended to allow mining activity near the junction of a mine access or haul road with a public road. The legislative history of the Act clearly demonstrates that the purpose of the exception clause is merely to allow access and haul roads to join public roads by excepting the former from the setback requirement.[7]

The Administrative Law Judge also based his conclusion in part on his finding that OSM failed to show when the topsoil piles had been placed in the location in question. OSM provided evidence that established the existence of topsoil piles within 100 feet of a public road in the area disturbed by Central's operation (Tr. 31–32; Exh. R–16). That evidence was sufficient to establish a prima facie case. Central failed to rebut.

That part of the decision which affirmed violation Nos. 1, 2, 3, 4, 5, 7, and 8 as properly issued is affirmed; that part which vacated violation No. 6 is reversed.

Newton Frishberg
Administrative Judge

Melvin J. Mirkin
Administrative Judge

Will A. Irwin
Chief Administrative Judge

BLACK HAWK RESOURCES CORP.

50 IBLA 399

Decided *October 24, 1980*

Appeal from decision of the Wyoming State Office, Bureau of Land Management, rejecting high bid in competitive oil and gas lease sale. W 71493.

Reversed and remanded.

1. Oil and Gas Leases: Generally—Oil and Gas Leases: Applications: Sole Party in Interest—Oil and Gas Leases: Competitive Leases

Although under the Departmental regulations a competitive bidder in an oil and gas lease sale, must, where there is another party in interest, submit the signed statements required by 43 CFR 3102.7, failure to comply with the regulation does not require rejection of the bid. This result follows because in noncompetitive offerings the critical element is determining the first qualified offeror. For competitive bidding, the amount of the bid replaces priority of filing as the dominant factor.

---

[7] The exception language was originally suggested in 1975 by the Ford Administration. The Senate Committee on Interior and Insular Affairs reviewed the suggestion and stated:

"19. *Haul roads. Recommendation:* 'Requirements of S. 425 could preclude some mine operators from moving their coal to market by preventing the connection of haul roads to public roads. The Administration's bill would modify this provision.'

"*Committee Comment:* This was not the intent of S. 7.

"*Committee Recommendation:* Adopt Administration amendment." S. Rep. No. 28, 94th Cong., 1st Sess. 191 (1975). The exception language was included in S. 7 as reported out of Committee. During debate on the Joint Conference bill (H.R. 25) of that session, which contained the clause, the following statement was made by Rrepresentative Mink:

"Again, in my judgment, none of these modifications has done serious harm to the basic integrity of the act. For example, unintended moratoriums on surface mining, an inadvertent ban against connecting haul roads to public highways and needless interference with long term contracts between producers and consumers of coal were exposed and cleared up." 121 Cong. Rec. 13382 (1975).

APPEARANCES: Ralph R. Wilkerson, President, Black Hawk Resources Corp., for appellant.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

INTERIOR BOARD OF LAND APPEALS

This appeal is from a decision dated June 27, 1980, by the Wyoming State Office, Bureau of Land Management (BLM), rejecting appellant's high bid for parcel 29 of the competitive oil and gas sale held on June 4, 1980. The bid was rejected because appellant failed to certify as to acreage limitations under 43 CFR 3102.2-2 (45 FR 35156 (May 23, 1980)) and to submit statements required under 43 CFR 3102.2-7(b) (45 FR 35156 (May 23, 1980)), which provides:

> A statement, signed by both the offeror or applicant and the other parties in interest, setting forth the nature of any oral understanding between them, and a copy of any written agreement shall be filed with the proper Bureau of Land Management office not later than 15 days after the filing of the offer, or application if leasing is in accordance with subpart 3112 of this title. Such statement or agreement shall be accompanied by statements, signed by the other parties in interest, setting forth their citizenship and their compliance with the acreage limitations of §§ 3101.1-5 and 3101.2-4 of this title.

An attachment to appellant's bid form indicated that Black Hawk Resources Corp. owned 66⅔ percent of the bid and Juniper Petroleum Corp 33⅓ percent. Juniper's qualification file number was also given.

Appellant concedes on appeal that it inadvertently omitted to certify as to acreage limitations as required by 43 CFR 3102.2-2. Appellant further states that the division of bid ownership between it and Juniper, as indicated on the attachment, "was the extent of the verbal agreement" between the parties. Appellant suggests that the attachment satisfied the requirements of 43 CFR 3102.2-7.

[1, 2] 43 CFR 3120.1-4 specifically requires bidders for competitive leases to comply with the regulations in subpart 3102. Since Juniper was another party in interest, sec. 3102.2-7 required a statement signed by both Black Hawk and Juniper as to the nature of any oral agreement between them. It also required a statement, signed by Juniper, setting forth *its* citizenship and compliance with the acreage limitation. The instructions on the back of appellant's bid form fully advise the bidder of all regulatory provisos which must be met if a bid is to be properly executed.

The Board vis-a-vis *noncompetitive offers* has held that failure to file the statements required by 43 CFR 3102.2-7 must result in rejection of the lease offer. *See*, for example, *H. J. Enevoldsen*, 44 IBLA 70; 86 I.D. 643 (1979); *William R. Curtis*, 37 IBLA 124 (1978). The Secretary's duly promulgated regulations have the force and effect of law and must be complied with. *See Elizabeth Pagedas* (*On Reconsideration*), 40 IBLA 21 (1979), and cases there cited. At first blush, it might appear that since appellant failed to comply with mandatory regulations the State Office properly did reject its bid.

In *North American Coal Corp.*, 74 I.D. 209 (1967), the Department addressed itself to the failure of a high bidder to timely submit with his bid a statement of his citizenship and coal lease interests.

North American discusses the difference between competitive and noncompetitive offerings as follows:

> The Department's usual rule, at least for noncompetitive dispositions of mineral leases or permits, is that an offeror who fails to comply with a mandatory requirement of a regulation is not a qualified applicant and is not entitled to priority until the defect is cured. *Ruby Company*, 72 I.D. 189 (1965); *Virgil V. Peterson*, A-30685 (March 30, 1967).
>
> * * * * *
>
> Where competitive bidding is permitted, however, price replaces time as the primary criterion for determining who will be awarded a lease or permit. Competitive bidding is based upon the underlying assumption that all bidders have an equal opportunity to compete upon a common basis with other bidders.
>
> North American argues that the integrity of the bidding system would be compromised if the Department permitted a late filing of a required statement. It points out that a bidder could withhold his deposit until he determined whether he wanted to complete his bid and then, after an opportunity to reevaluate the desirability of a lease, file or not file the deposit as he sees where his interest lies.
>
> This argument assumes that all requirements are equally important so that none can be neglected lest some bidder gain an unfair advantage. We agree that if a bidder could withhold his bid deposit without penalty he would be in a much better position than other bidders. However, since the consequences of permitting deviations in so important an aspect of competitive bidding as the bid deposit would be so destructive to the orderly conduct of lease sales, such a lapse would not be excused. See *Malcolm N. McKinnon*, A-29979, A-29996 (June 12, 1964).
>
> A statement relating to citizenship and other holdings, however, is on a different footing. We must assume that the bidder is qualified or else there would be no reason for him to participate in the sale. If he is qualified, there does not seem to be any advantage accruing to him from failing to file the required statements.
>
> The only penalty provided by the regulations for failure of a high bidder who has been awarded a lease to complete the steps necessary to its issuance, such as payment of the first year's rental, submission of a bond, signing the lease, is forfeiture of the bid deposit. 43 CFR 3132.4-3(b). Thus, every high bidder has an opportunity for a second guess if he is willing to part with his deposit, and one who has omitted to submit a statement required with his bid deposit has no option not open to any other high bidder.
>
> The Comptroller General has recognized that failure to comply with a mandatory requirement of a bid invitation, even though prescribed by regulation, does not always necessitate rejection of the bid.
>
> In a recent decision he restated the considerations pertinent to determining when deviations from the provisions of an advertisement for bids may be allowed:
>
> "Whether certain provisions of an invitation for bids are to be considered mandatory or discretionary depends upon the materiality of such provisions and whether they were inserted for the protection of the interests of the Government or for the protection of the rights of

> bidders. Under an advertised procurement all qualified bidders must be given an equal opportunity to submit bids which are based upon the same specifications, and to have such bids evaluated on the same basis. To the extent that waiver of the provisions of an invitation for bids migh [*sic*] result in failure of one or more bidders to attain the equal opportunity to compete on a common basis with other bidders, such provision must be considered mandatory. However, the concept of formally advertised procurement, insofar as it relates to the submission and evaluation of bids, goes no further than to guarantee equal opportunity to compete and equal treatment in the evaluation of bids. *It does not confer upon bidders any right to insist upon the enforcement of provisions in an invitation, the waiver of which would not result in an unfair competitive advantage to other bidders by permitting a method of contract performance different from that contemplated by the invitation or by permitting the bid price to be evaluated upon a basis not common to all bids. Such provisions must therefore be construed to be solely for the protection of the interests of the Government and their enforcement of waiver can have no effect upon the right of bidders* to which the rules and principles applicable to formal advertising are directed. To this end, the decisions of this Office have consistently held that where deviations from, or failures to comply with, the provisions of an invitation do not affect the bid price upon which a contract would be based or the quantity or quality of the work required of the bidder in the event he is awarded a contract, a failure to enforce such provision will not infringe upon the rights of other bidders and the failure of a bidder to comply with the provision may be considered as a minor deviation which can be waived and the bid considered responsive. 45 Comp. Gen. 221, 223 (1965), quoting 40 Comp. Gen. 321, 324 (1960)." [Italics supplied.]

74 I.D. at 210–212.

That distinction is further mentioned in a footnote in *Alaska Oil and Minerals Corp.*, n.1, 29 IBLA 224, 231, 84 I.D. 114, 118 (1977), as follows:

> A key distinction was made in this decision [North American] between bids on competitive mineral leases and offers on noncompetitive mineral leases. For noncompetitive mineral lease offers, strict compliance with regulations is required because the essential element is determining the *first* qualified offeror. For competitive lease offers, however, the amount of the bid replaces priority of filing as the determining factor. *Id.* at 211; *Ballard E. Spencer Trust, Inc.*, 18 IBLA 25, 28 (1974), *aff'd*, *Ballard E. Spencer Trust, Inc.* v. *Morton*, 544 F.2d 1067 (10th Cir. 1976); *Silver Monument Minerals, Inc.*, 14 IBLA 137, 139 (1974). [Italics in original.]

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed and the case remanded to BLM to afford appellant a reasonably limited opportunity to make the necessary showings, *e.g.*, 30 days from service of notice. Upon compliance therewith the lease is to issue to appellant, all else being regular.

Frederick Fishman
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Anne Poindexter Lewis
Administrative Judge

CLARENCE RUNS AFTER
v.
ABERDEEN AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS, AND CHEYENNE RIVER SIOUX TRIBE

8 IBIA 170

Decided *October 27, 1980*

Appeal from decision by area director upholding superintendent's denial of refund and refusal to terminate payments from appellant's Individual Indian Money account made pursuant to an assignment of income claimed by appellant to be invalidated by his discharge in bankruptcy.

Affirmed.

1. Bureau of Indian Affairs: Administrative Appeals: Acts of Agents of the United States

Where review is sought of action by BIA officials disbursing IIM account funds pursuant to agency regulation, their handling of the disbursements is reviewable by the IBIA under 25 CFR 2.3.

2. Indians: Civil Rights—Indians: Indian Civil Rights Act of 1968

A complaint that transfer of funds from an IIM account violates due process provisions of the Indian Civil Rights Act, 25 U.S.C. § 1302 (1976), lies outside the review authority of the Department of the Interior.

3. Indian Lands: Allotments: Alienation—Indian Lands: Assignments

An Indian tribe, seeking to enforce debt collection of loan secured by mortgage of trust lands and assignment of income from trust lands executed more than 1 year prior to bankruptcy, presented an assignment of trust income executed in conformity with 25 CFR 109.4 to BIA officials responsible for administration of appellant's IIM account. The security interest thus obtained in appellant's trust lands by the tribe is a perfected security interest which attaches to the fund and entitles the tribe to the payments made by the agency officials despite appellant's intervening adjudication of bankruptcy.

APPEARANCES: Clarence Runs After, appellant, pro se; Wallace G. Dunker, Esq., Aberdeen Field Solicitor, for appellee area director.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

INTERIOR BOARD OF INDIAN APPEALS

On July 6, 1960, appellant executed a note for $13,500 secured by a mortgage of 268 acres of appellant's trust lands in Dewey County, South Dakota, to the Cheyenne River Sioux Tribe (tribe) under tribal loan agreement No. 326. Earlier, on Apr. 12, 1960, he had executed an assignment to the tribe under agreement No. 326 authorizing payments to the tribe from income received from his trust lands into his Individual Indian Money account (IIM account), to be applied towards satisfaction of the loan in the event of his default of payments on the loan.[1] Both the mortgage and income assignment were approved by the agency superintendent concerned. Quarterly payments on the loan began on Jan. 15, 1961, and continued until Oct. 15, 1970. Meantime, appellant was adjudged a bankrupt on Oct. 9, 1963 (No. BK 63-94-C, U.S.D.C., D.S.D). Following adjudication, appellant protested the involuntary application of trust income from his IIM account towards payment of the tribal loan by the agency. In 1976 he made a formal written demand that the payments stop and that he be reimbursed for payments taken over his objection. Both the Bureau of Indian Affairs (BIA) superintendent and the area director concerned opined that agency transfer of the IIM funds was permissible as an exception to the rule that the bankruptcy law bars collection of discharged debts, on the theory that the transaction involved was an informal collection procedure outside the contemplation of the Bankruptcy Act, the Act of July 1, 1898, Ch. 541, 30 Stat. 544, *as amended*, 11 U.S.C. §§ 1 through 1103 (1976). The matter is now before this Board pursuant to 25 CFR 2.19(b), upon direct referral by the Commissioner of Indian Affairs.

Appellant seeks to obtain reimbursement of all amounts paid since his discharge in bankruptcy under the 1960 assignment together with an order preventing future diversions of his trust monies to the tribe through the use of the assignment. Relying upon *Aubertin* v. *Colville Confederated Tribes*, 446 F. Supp. 430 (E.D. Wash. 1978), appellant contends that collection of the debt through presentation of an assignment to the agency is barred by sec. 17 of the Bankruptcy Act, 11 U.S.C. § 35 (1976). He contends also that the taking of his IIM account monies was in violation of due process requirements of the Indian Civil Rights Act of 1968, 25 U.S.C. § 1302 (1976).

---

[1] In pertinent part, the assignment provides:

"In consideration of the granting of a loan to the undersigned under the terms of loan agreement No. 326 the undersigned hereby assigns to the lender as security for repayment of such loan, the following: (a) All property, except land, which is now or may in the future be held in trust for the undersigned by the United States; (b) all income from trust land in which the undersigned now has or may in the future acquire an interest; (c) any income from any source and any funds from any source accruing to the individual Indian account of the undersigned.

"Any income received from the lands held in trust by the United States Government or any income received from the sales of personal property.

"The undersigned hereby grants to the superintendent of the agency under which the lender is operating, full right, power and authority to demand, collect, sue, or receipt for any property and income of the undersigned, and to apply such income on the indebtedness of the undersigned to the lender. If payment is not made as set forth in the loan agreement of the undersigned, said superintendent or his authorized agency may take possession of any trust property or income of the undersigned, and dispose of the same in accordance with instructions of the Commissioner of Indian Affairs, and apply the proceeds on said indebtedness.

"The undersigned does hereby appoint said superintendent as the undersigned's attorney to execute such leases on any trust land in which the undersigned now has, or may in the future acquire an interest, as the attorney may find necessary to facilitate repayment of the loan. The undersigned hereby gives the attorney power to do everything necessary in the making of such leases as fully as the undersigned could do, and hereby ratifies all that the attorney shall lawfully do or cause to be done under this authority.

"It is understood that in the case of death of the undersigned, this assignment and power to lease shall constitute a claim against trust funds, income, or trust property superior to that of the heirs of the undersigned."

The area director, represented on appeal by the field solicitor, denies that any effective objection to the continued involuntary collection by BIA of the debt for the tribe was voiced by appellant following his discharge in bankruptcy. He also contends that, even if the debt was not revived by involuntary payments made subsequent to discharge, the collection process used by the BIA on behalf of the tribe was so informal as to constitute a payment obtained without official process of any kind, taking it outside the operation of the bankruptcy statute. An added argument is made that property of an Indian bankrupt is exempt property within the meaning of the Bankruptcy Act provisions codified at 11 U.S.C. § 24 (1976), and that, since the secured trust property could not pass to the trustee in bankruptcy (as it would otherwise have done), the debt which the mortgage and assignment of income secured remained unaffected by the discharge in bankruptcy. To support this proposition, reliance is placed upon a line of Federal cases including *In Re Penn*, 41 F.2d 257 (D. Okla. 1929); *In Re Denison*, 38 F.2d 662 (W.D. Okla. 1930); and *In Re Russie*, 96 F. 609 (D. Or. 1899).

Appellant's analysis of the issue presented concludes that the continued use of appellant's trust account by agency officials to pay the tribal loan following the discharge of the debt in bankruptcy violates 25 CFR 104.9 [2] by permitting payments from his IIM account which are prohibited by an Act of Congress, the Bankruptcy Act. The appellee's analysis of the matter focuses upon the remedy sought rather than the agency conduct complained of, and concludes that, for various reasons, neither of the remedies sought—refund of monies taken nor prevention of future takings of tribal money—is available to appellant as a matter of law.

---

[2] The Departmental regulation is interpreted by the Bureau of Indian Affairs in its Indian Affairs Manual at 42 IAM 6.3.3E(21)(h), which provides:

"(h) *Assignments of Trust Income.* Future income may not be obligated to third parties but may be assigned to secure loans. Form 5-845 (Revised), Assignment of Income From Trust Property, when approved by the Superintendent under authority delegated by Section 2.134 of Aberdeen Redelegation Order No. 2 Amdt. 5 (14 IAM 4), is recognition of a lender's right to demand and receive income from the trust land described thereon from the Superintendent, upon default of an Indian borrower, and to apply such upon the indebtedness in accordance with the terms of the note or other evidence of indebtedness. This assignment form, however, is effective only if the payments relating to the loan are not made by the Indian borrower, to the lender as agreed upon. The Superintendent should not honor demand requests until he has first ascertained (1) that the Indian borrower has defaulted, and (2) that the lender has exhausted all other means of effecting collection from the borrower in accordance with the terms of the agreement before resorting to demand against the assignment. Credit extended to Indians on open account, installment contracts, or conditional sales contracts does not qualify as a loan and Forms 5-845 shall not be approved therefor. A point to be borne in mind in connection with this form is that the three parties involved are: (1) The Indian borrower (2) the Superintendent, and (3) the lender. Form 5-845 does not make provisions for reflection of a specified amount. This is determined by the Superintendent after receipt of demand correspondence from the lender. Any checks drawn by the ISSDA in payment therefor, shall be pursuant only to specific Form 5-139b signed by the Superintendent or his designated representative. The Form 5-139b should contain the statement 'Funds obligated under contractual arrangements approved in advance.' '25 CFR 104.9' should be cited as the authority for the disbursement."

Although the parties seemingly disagree concerning whether there was a reaffirmation of the debt in loan No. 326, the administrative record indicates their disagreement concerns the effect of known facts rather than the facts themselves.[3] The issue is not whether there was a reaffirmation, but whether the agency must give effect to the 1963 bankruptcy decree. Finally, the question is raised, if the Bankruptcy Act does regulate agency administration of this matter, what action should be taken to properly apply the law to the circumstances described.

[1] Suggestion is made that the collection effort on behalf of the tribe by the BIA is not reviewable because it is not an agency action concerning which review is possible under 25 CFR 2.3. Because the subject of this matter is the transfer of IIM account funds claimed to be in violation of agency regulation establishing the method for handling such funds, the decision to continue to make the disbursements objected to by appellant is within the class of administrative action described by 25 CFR 2.3(a), since it involves a decision of an official under the supervision of an area director of the BIA not previously approved by the Secretary. Accordingly, it is concluded the Commissioner of Indian Affairs correctly referred the matter to this Board for review pursuant to 25 CFR 2.19(b).[4]

[2] Since the decision in *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49 (1978), it appears that review of complaints claiming deprivations of rights under the Indian Civil Rights Act of 1968, the Act of Apr. 11, 1968, 82 Stat. 77, 25 U.S.C. §§ 1301–1341 (1976), is outside the authority of this agency. The sole issue on appeal therefore concerns the application of the Bankruptcy Act to the conduct of agency business under 25 CFR 104.9 in making transfers from appellant's trust account.

[3] The Bankruptcy statute is an Act of universal application, which

---

[3] Appellant's brief at page 1 recites that collections from the trust account were made over his protest and that "[r]ecently, the tribe attempted to get him to sign * * * [a reaffirmation of the debt] but he refused." The Bureau response to this assertion is that "[t]he appellant falsely asserts that he made no such arrangement [referring to the assignment of income], with the tribe and also falsely asserts that there now exists no agreement." Answer Brief at 4.

[4] It should be noted, however, that the area director's action in dispute was appealed to the Commissioner in May 1977. While the appeal to the Commissioner could have been referred to the Board 30 days later absent agency action (25 CFR 2.19), the matter was not referred to this Board until Jan. 14, 1980.

applies to all individuals and Government agencies equally as it does to all other segments of American society. *In Re Stineman*, 155 F.2d 755 (3d Cir. 1946), *reversed on other grounds sub nom., United States National Bank* v. *Chase National Bank*, 331 U.S. 28 (1947); *In Re Minot Auto Co.*, 298 F. 853 (8th Cir. 1924). Nothing in the Bankruptcy Act nor in the character of the tribe as a sovereign entity is inconsistent with a finding that the Act's provisions are binding upon all the parties to this matter.[5] (*Cf. Morongo Band of Mission Indians* v. *Bureau of Indian Affairs*, 7 IBIA 299, 86 I.D. 680 (1979), declaring the Highway Beautification Act of 1965 inapplicable to Indian reservations.)

Contrary to appellee's contentions, the conduct of formal action by the BIA, an official Governmental agency, to enforce a security instrument previously approved pursuant to statute and agency regulation is not an informal collection device. It is official action, similar to court process. *See Girardier* v. *Webster College*, 563 F.2d 1267 (8th Cir. 1977).[6] In this case, agency action resulted in foreclosure of the assignment given by appellant to secure his debt to the tribe. *In Re Penn*, above, and related decisions cited by appellee merely hold that trust assets which are not subject to legal process in a direct action against the bankrupt beneficiary of the trust cannot be taken for the benefit of creditors by the bankruptcy trustee. The cited cases were decided before passage of the Act of Mar. 29, 1956, 70 Stat. 62 (25 U.S.C. § 483a (1976)), permitting mortgage of Indian trust lands under certain circumstances and authorizing foreclosure or sale of the land in the event of default. The provisions of this statute, as implemented by 25 CFR 121.34, apply to the trust lands of appellant whose mortgage and assignment were approved by the agency acting within its statuory mandate. As those rules are here applied, the execution of the security agreements in full conformity to the regulatory scheme established a perfected security interest in favor of the tribe within the purview of the Bankruptcy Act. *Cf., In Re Babcock Box Co.*, 200 F. Supp. 80 (D. Mass. 1961).

---

[5] The *Aubertin* decision, cited above, although now overruled by *Martinez* in its holding that the plaintiff could maintain an action under the Indian Civil Rights Act, observed that tribal sovereignty and powers of self-government are not infringed by a finding that the Bankruptcy Act applies to Indian tribes:

"I find that allowing a bankruptcy discharge to operate against the Tribes in this case will not undermine tribal institutions. Defendant is engaged in the business of lending money, following loan practices similar to those of any non-Indian lender operating in the commercial money market. Its claims that its loan program would be hurt if a discharge in bankruptcy is effective against it may be true. But it does not necessarily follow that its business activities should therefore constitute internal tribal affairs free from the reach of applicable federal laws. The Tribes' loan transactions are commercial activities properly subject to the Bankruptcy Act. Section 17c(3) of the Bankruptcy Act, 11 U.S.C. 35(c)(3), provides that the bankruptcy court shall determine the dischargeability of any debt not excepted under Section 17a. For the reasons stated above, I conclude that the Bankruptcy Act is an implied waiver of tribal immunity and that the bankruptcy court has the authority to discharge plaintiff's debt to the Colville Confederated Tribes." 446 F. Supp. 430, 435 (1978).

[6] The court summarizes the rule thus: "The usual usage of 'process' denotes activation of the formal legal machinery of a government but not refusals by a nonpublic person to act." 563 F.2d at 1273 (1977).

Thus, the mortgaging statute, 25 U.S.C. § 483a (1976), has the effect of placing a mortgagee of Indian trust lands in the same position as any secured creditor of land when confronted by a bankrupt mortgagor. It was proper under the law prior to 1978 for such a creditor to claim his secured interest by proceeding against the security in the appropriate forum. Usually the forum would be a state court. In this case, the appropriate forum was the BIA office charged with administration of assignments of IIM accounts. Since the assignment of income was a perfected security interest under applicable agency regulations governing such transactions, the tribe was entitled to take its security interest by obtaining payments through BIA from appellant's IIM account. Under the circumstances, therefore, the tribe proceeded as it was entitled to do under the bankruptcy law since the perfected lien it held on the IIM account effectively placed the security in the possession of the tribe unde
agency regulations.[7]

Appellant does not suggest tha
the security interest held by th
tribe was improperly obtained, o
should have been included in hi
assets taken by the trustee. Whil
as he argues, the bankruptcy la
applies to this case, that law merel
requires that reference be had to th
applicable law, state or Federa
which defines the rights of the pa
ties to the security transaction. *Ro*
enberg v. *Rudnick*, 262 F. Sup
635 (D. Mass 1967). The assignme
given by appellant to the tribe w
made more than a year before ban
ruptcy. Under the circumstances
this transaction it appears a perfec
ed security agreement under Fe
eral law was in effect against a

---

[7] The secured creditor under the Bankrupt
Act as it applied to this case prior to the Ac
major revision by the Act of Nov. 6, 1978,
Stat. 2549, 11 U.S.C. § 101 (Supp. II 197
had several courses of action open. It co
seek to be included as general creditor (
U.S.C. § 93(g) (1976)), or could pursue t
security for satisfaction of the claim (
U.S.C. § 93(h) (1976)). *United States N*
tional Bank v. *Chase National Bank, sup*
The tribe chose to pursue the latter cou
The alternative courses of action available
described in the *Chase Bank* opinion at
U.S. 33:

"Under these provisions, there are seve
avenues of action open to a secured cred
of a bankrupt. * * * (1) He may disreg
the bankruptcy proceeding, decline to fil
claim and rely solely upon his security
that security is properly and solely in
possession. * * * (2) He must file a secu
claim, however, if the security is within
jurisdiction of the bankruptcy court and if
wishes to retain his secured status, inasm
as that court has exclusive jurisdiction o
the liquidation of the security. * * * (3)
may surrender or waive his security
prove his entire claim as an unsecured o
* * * (4) He may avail himself of his secu
and share in the general assets as to
unsecured balance." (Citations omitted.)

pellant's IIM account in 1963 and the payment of accruing amounts from the account was a proper administration of the security arrangement made. *See Grain Merchants of Indiana, Inc.* v. *Union Bank and Savings Company*, 408 F.2d 209 (7th Cir. 1969). (*See also* Anderson on the Uniform Commercial Code, 2d Ed. (1971) § 9-108:1 through 9-108:5; Uniform Commercial Code § 9-108.)

The reasoning in the *Aubertin* opinion, cited above, and principally relied upon by appellant, is directly applicable and controlling in this case. Here, as in *Aubertin*, money was withheld from an IIM account following default by a borrower soon to become a bankrupt; the tribe possessed a perfected security interest in the IIM account and foreclosed against the security so held; the intervening discharge was ineffective to prevent payment of the monies assigned from the bankrupt's IIM account.[8]

Since the regulatory requirements of 25 CFR 109.4 were met by the agency in administering the provisions of 25 U.S.C. § 483a (1976), and there was no regulatory conflict with any provision of the Bankruptcy Act then in force, appellee properly concluded that payments according to the terms of the previously approved assignment of income should be completed despite the intervening bankruptcy of appellant. The determination by the area director permitting continued application of appellant's IIM funds to loan account No. 326 until the debt is satisfied is affirmed.

This decision is final for the Department.

FRANKLIN ARNESS,
Administrative Judge

I CONCUR:

WM. PHILILP HORTON
Chief Administrative Judge

WALTER S. BROWN
v.
COMMISSIONER OF INDIAN AFFAIRS

8 IBIA 183

Decided *October 28, 1980*

Appeal from decision by Acting Deputy Commissioner of Indian Affairs denying appellant's request to gift deed a portion of his allotment on the Quinault Reservation to his nephew, also an owner of a Quinault allotment, on grounds that the nephew was not qualified under the Indian Reorganization Act to receive such a gift.

Reversed.

---

[8] The *Aubertin* opinion points out at n.5, 446 F. Supp. 432 (1978) and again at 446 F. Supp. 436, that the bankruptcy decree did not discharge specific debts, but merely ordered discharged those debts which were dischargeable. Under an amendment to the Act, not applicable here, the bankrupt Aubertin was able to litigate the question whether the tribe's debt was discharged. While in *Aubertin* the court was able to avoid a direct answer to the question, in this case the security interest is found to have survived discharge.

1. Indian Tribes: Membership

It is for the Indian tribe, not this Department, to determine composition of the tribe. In 1922 the Quinault Tribe did not recognize as members thereof any Indian of the reservation, but affiliate memberships were authorized for persons of one-quarter Quileute, Hoh, Chehalis, Chinook, or Cowlitz blood, under specified conditions.

2. Indian Lands: Allotments: Alienation—Indian Reorganization Act

In light of the unique hitsory of land ownership and Federal-Indian relations on the Quinault Reservation, any Quinault allottee living on June 1, 1934, should be entitled to receive other trust land on the reservation by gift deed in accordance with the provisions of secs. 5 and 19 of the Indian Reorganization Act (25 U.S.C. §§ 465 and 479 (1976)).

APPEARANCES: Daniel L. Van Mechelen, Seattle, Washington, for appellant; James R. Kuhn, Jr., Esq., Office of the Regional Solicitor, Portland, Oregon, for respondent.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

INTERIOR BOARD OF INDIAN APPEALS

Walter S. Brown has appealed from a decision rendered Sept. 21, 1979, by Acting Deputy Commissioner of Indian Affairs, Theodore C. Krenzke, wherein it was held that appellant could not gift deed a portion of his allotment located on the Quinault Indian Reservation (Allotment No. Q 1674) in trust to his nephew, Daniel L. Van Mechelen, holder of a trust patent on the Quinault Reservation.

The Quinault Reservation is governed by the provisions of the Indian Reorganization Act of June 18, 1934 (IRA), 48 Stat. 984, 25 U.S.C. §§ 461-486 (1976), *as amended*. Sec. 5 of the Act, codified at 25 U.S.C. § 465, generally authorizes the gift conveyance of trust land to an Indian or Indian tribe. Sec. 19 of the Act, codified at 25 U.S.C. § 479, defines the term "Indian" for, among other purposes, determining who may receive a gift conveyance of an allotment in trust status. This section reads in pertinent parts as follows:

> § 479. Definitions
>
> The term "Indian" as used in sections 461, 462, 463, 464, 465, 466–470, 471–473, 474, 475, 476–478, and 479 of this title shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood.

The above section denotes three means by which an individual may be considered an Indian for certain IRA purposes, including, as pertinent herein, eligibility to receive a conveyance of trust land located on an IRA reservation. The issue in this appeal is whether Daniel L. Van Mechelen, the proposed recipient of a gift of trust land located on the Quinault Reservation, satisfies any of the "Indian" definitions set forth in 25 U.S.C. § 479.

Summary of Bureau's Position

The Commissioner's Office held that Mr. Van Mechelen does not satisfy the eligibility requirements of sec. 479 because: (1) he is only one-eighth Indian blood (Cowlitz), precluding compliance with the statutory classification of "persons of one-half or more Indian blood"; (2) the Cowlitz Tribe, in which Mr. Van Mechelen is a member, neither now nor in the past has received Federal recognition, thereby precluding compliance with the statutory classification of "persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction"; and (3) although Mr. Van Mechelen is a descendant of a member of a recognized Indian tribe under Federal jurisdiction, he was, nevertheless, not a resident of the Quinault Reservation on June 1, 1934, precluding compliance with the residency requirement of sec. 479.

Appellant's Position

Appellant, who is represented in this matter by Mr. Van Mechelen, maintains that Indians who were allotted lands on the Quinault Reservation, even though not of Quinault blood, may not be deprived of benefits accorded individual Indians under the IRA, especially when such allottees appeared on the census roll for the Quinault Reservation when the IRA was enacted.

Preliminary Findings

The Bureau and appellant do not disagree as to the following. Mr. Van Mechelen is a member of the Cowlitz Tribe, which is not federally recognized. He is the owner of a trust patent located on the Quinault Reservation. The trust patent was granted by President Roosevelt on Apr. 21, 1933, pursuant to the Act of Mar. 4, 1911, 36 Stat. 1345. Mr. Van Mechelen possesses less than one-half degree Indian blood. When the IRA was enacted, Mr. Van Mechelen appeared on the official census roll of Indians of the Quinault Reservation. However, having been born on Sept. 22, 1928, he was not old enough to vote on the acceptance of the IRA, as were adult Indians of the Quinault Reservation.[1] Mr. Van Mechelen is a descendant of an Indian who, on June 1, 1934, was a member of a recognized Indian tribe under Federal jurisdiction. On June 1, 1934, Mr. Van Mechelen's actual residence was not within the boundaries of any Indian reservation.

Discussion, Other Findings, and Conclusions

Appellant's chief theory in this appeal is that notwithstanding that the present day Quinault Tribe fails to recognize Mr. Van Mechelen as a member thereof, as an "Indian of the Quinault Reservation" when the IRA was passed, Mr. Van Mechelen was a member of a federally recognized group of Indians at that time and, under the wording of sec. 19, he is presently entitled to the benefits of the IRA. According to appellant, the Bylaws of the Quinault Tribe from 1922 to 1965 recognize that the Quinault Tribe and "Indians of the Quinault Reservation" were one and the same entities. (Appellant's brief filed Aug. 29, 1980, at 3 and 7.)

---

[1] Sec. 18 of the IRA left the choice of whether or not the Act would apply to a particular reservation to a majority vote of the adult Indians of the reservation. *See* 25 U.S.C. § 478.

As authority for the proposition that membership in a recognized tribe as of 1934 is sufficient to satisfy the requirements of sec. 19 of the IRA, appellant cites the beginning passage of the law which reads: "The term 'Indian' * * * shall include all persons of Indian descent who are members of any recognized Indian tribe *now under Federal jurisdiction*." (Appellant's emphasis.) We do not consider it necessary to dwell on the import of the phrase underscored above for the reason that appellant cannot show that Mr. Van Mechelen was a member of a federally recognized tribe on June 18, 1934 (the date of enactment of sec. 19). Accordingly, we are not persuaded that the Quinault (or Quinaielt) Reservation were "one and the same" when the IRA was passed.

Appellant's original position in this appeal was that there was no Quinault Tribe in 1934 but, instead, a group known as the "Indians of the Quinaielt Indian Reservation." (Notice of Appeal dated Oct. 29, 1979, at 1.) In support of this contention, appellant makes reference to bylaws adopted by the first council of this "group" on Aug. 24, 1922, entitled: "By-laws of the General Council of The Indians of the Quinaielt Indian Reservation." After counsel for the respondent bureau pointed out in its answer brief that the bylaws cited by appellant commence with the words, "We, the members of the Quinaielt Tribe of Indians of the Quinaielt Reservation," appellant replied as follows:

> Mr. Kuhn points out my contention that in 1934 there was no "Quinaielt Indian Tribe."—I stand corrected. Mr. Kuhn's "discovery" proves that the "Quinaielt Tribe of Indians of the Quinaielt Reservation" and the "Indians of the Quinaielt Indian Reservation" were one and the same in 1922 and 1965 (when the bylaws were amended) and all the years in between."

Reply Brief at 3.

[1] The Board does not accept the strained interpretation which appellant gives to the bylaws cited. First, it is for the Indian tribe and not this Department to determine composition of the tribe. *See Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49 (1978); *United States* v. *Mazurie*, 419 U.S. 544 (1975); *Martinez* v. *Southern Ute Tribe of Southern Ute Reservation*, 249 F.2d 915 (10th Cir. 1957). Second, the 1922 Bylaws of the Quinault Tribe, which were

in effect in 1934, identified the requirements necessary for membership in the tribe. Contrary to appellant's assertion, these bylaws did not authorize membership for any Indian of the reservation. Affiliate memberships were authorized, however, for persons of one-quarter Quileute, Hoh, Chehalis, Chinook, or Cowlitz blood under other specified conditions.[2]

Because appellant cannot show that the Quinault Tribe recognized Mr. Van Mechelen as a member thereof in 1934, and in the absence of any evidence that he was or is now a member of any other federally recognized tribe, Mr. Van Mechelen fails to satisfy the first definition of "Indian" set forth in 25 U.S.C. § 479.

The only definition which Mr. Van Mechelen can possibly satisfy under 25 U.S.C. § 479, in order to receive a gift conveyance of trust land, is as a descendant of a member of a federally recognized tribe who, on June 1, 1934, was residing within the boundaries of an Indian reservation.[3]

The above criterion is susceptible to several interpretations. There is first of all an ambiguity as from whom Congress expected residence on a reservation at the time prescribed. By memorandum dated Mar. 24, 1976, former Associate Solicitor for Indian Affairs Reid Chambers advised the Commissioner of Indian Affairs that the "descendant" rather than the tribal "member" must have resided within an Indian reservation on June 1, 1934. We agree with this interpretation and the reasons therefor. Appellant, whose cause would benefit from an opposite interpretation, does not challenge the requirement as stated.

[2] The difficult question is resolving whether the residency requirement of sec. 479 may be satisfied by "constructive residence" and, if so, the elements associated therewith. By memorandum dated June 14, 1976, former Associate Solicitor Chambers also expressed an opinion on this question:

> It is pointed out in the Joint Statement [of the Quinault Nation and Quinault Allottees Association of January 20, 1976] that some Quinault allottees who voted to accept the Indian Reorganization Act are now denied its benefits by the bureau policy of requiring actual residence on the Quinault Reservation rather than constructive residency which was purportedly required for voting on the Act in 1935. I can see no difference between actual and constructive residence in this situation. If the allottee is not a member of a federally recognized tribe, as provided in the first category of the statutory definition, and is less than one-half degree [Indian blood], thus not meeting the criterion of the third category, but is a descendant of a tribal member and himself voted as a Quinault allottee on the Reorganization Act, then that is a rebuttable presumption of their [*sic*] reservation residency. * * * I agree with the Joint Statement

---

[2] Article 1(b) of 1922 bylaws.

[3] Paraphrasing 25 U.S.C. § 479 which refers in part to "all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation."

that persons receiving allotments on the Quinault Reservation and who voted on the Act should not now be denied its benefits.

In response to the above opinion, the Business Committee of the Quinault Indian Nation offered its views thereon in a statement to the Assistant Secretary for Indian Affairs dated July 24, 1978. It surmised from Mr. Chambers' opinion that non-adult person who were ineligible to vote in the IRA election would be unable to establish "constructive residency." With respect to this situation, the Business Committee stated: "It does not appear to be equitable to limit the concept of a rebuttable presumption of constructive residence on the reservation by denying that presumption to those who, but for their minority, would have had the opportunity of establishing it."

Notwithstanding the Associate Solicitor's opinion generally favoring under the law a constructive residency approach, and the specific consent of the Quinault Business Committee to the extension of this rule to persons possessed of trust interests on the Quinault Reservation who, but for their minority, could have voted on the application of the IRA to the Quinault Reservation, the Bureau of Indian Affairs has adhered, at least in the instance of Mr. Van Mechelen, to an actual residency requirement.

We believe an actual residency requirement is too restrictive for purposes of determining who may receive an *inter vivos* gift of trust land on the Quinault Reservation under the provisions of 25 U.S.C. § 465 (or under 25 U.S.C. § 483 which also provides for conveyances of trust property). In light of the unique history of land ownership and Federal-Indian relations on the Quinault Reservation, any Quinault allottee living on June 1, 1934, should be entitled to receive other trust land on the reservation by gift deed.

Relevant History of the Quinault Reservation

By the Treaty of Olympia, the Quinault and Quileute Tribes ceded to the United States almost all of the lands they claimed.[4] A provision of that treaty allowed the United States to later remove these tribes from their original reservation or reservations and consolidate them with "other friendly tribes or bands." In 1873 President Grant signed an Executive order setting the boundaries of the present Quinault Reservation for the benefit of the Quinault, Quileute, Hoh, Quit, and "other tribes of fish-eating Indians on the Pacific coast."[5]

Following passage of the General Allotment Act,[6] allotments were made to individual Indians on the Quinault Reservation. In 1911 Congress directed the Secretary of the Interior to make allotments on the Quinault Reservation to "all members of the Hoh, Quileute, Ozette, and other tribes of Indians in Washington who are affiliated with the Quinaielt [a.k.a. Quinault] and Quileute Tribes * * * and who may elect to take allotments on the Quinaielt Reservation rather than on the reservations set aside for these tribes." Act of Mar. 4, 1911, 36 Stat. 1345.

---

[4] Treaty of July 1, 1855, and Jan. 25, 1856, 12 Stat. 971.

[5] Executive order of Nov. 4, 1873, 1 Kappler, Indian Affairs Laws and Treaties 923 (1903).

[6] Act of Feb. 8, 1887, 24 Stat. 388

Following the 1911 Allotment Act, several court decisions were rendered interpreting the law. In *United States* v. *Payne*, 264 U.S. 446(1924), the Court disapproved of the refusal by the Bureau of Indian Affairs to make allotments of timberland, after the available grazing and agriculture land on the reservation had been allotted. In 1931 the Supreme Court held as too restrictive the Secretary's interpretation concerning which Indians were entitled to an allotment under the 1911 Act. *Halbert* v. *United States*, 283 U.S. 753 (1931). The Court there found that the Chehalis, Chinook, and Cowlitz Tribes were among those referred to by Congress in the Act as affiliated with the Quinault and Quileute Tribes. Further, the Court held that personal residence on the Quinault Reservation was not required to obtain an allotment.

After the *Halbert* decision the Department resumed the allotment process on the Quinault Reservation. With passage of the Indian Reorganization Act in 1934 the allotment of Indian reservation land in severalty to any Indian was ended. 25 U.S.C. § 461. A referendum on the adoption of the IRA was voted on by adult Indians of the Quinault Reservation on Apr. 13, 1935, pursuant to sec. 18 of the Act, resulting in acceptance of the IRA for the Quinault Reservation.[7]

Application of the IRA to Quinault Allottees

The respondent Bureau contends in this appeal that pre-IRA history on the Quinault Reservation is irrelevant to the effect and application of the IRA today:

> Mr. Van Mechelen received a trust patent pursuant to the Act of 1911 as construed in *Halbert* v. *United States*, *supra*, as a Cowlitz Indian and not because he was a member of a federally recognized tribe. The IRA was a wholly new scheme of land acquisition and under section 5 the Secretary is authorized in his discretion to acquire land in trust for those who are "Indians" as specifically defined in the Act. There is no interrelationship between the 1911 Act and patents issued thereunder and the provisions of the IRA.

Answer Brief at 12.

We do not agree that it is impermissible for the Department to draw on pre-IRA history on the Quinault Reservation in interpreting or applying IRA requirements.[8] Indeed, that is the very exercise which the Department performed in 1935 in determining the eligibility of Indians to vote in the IRA election pursuant to sec. 18 of the Act. Recognizing that there existed a large number of Quinault allottees who were absent from the reservation,[9] the Commissioner of Indian Affairs instructed the Superintendent of the Taholah Agency by memorandum dated Mar. 19, 1935, that reservation residence for purposes of determining eligibility to vote on application of the IRA could be actual or constructive. The Commissioner went on to instruct that in the case of constructive residence there must be a "certificate of the absentee voter that he is merely residing away temporarily and expects to return to the reservation." [10]

---

[7] The majority of the Indians actually residing on the reservation voted against acceptance of the IRA. The election was carried by "absentee voters." Memorandum to Commissioner of Indian Affairs from Superintendent, Taholah Agency, dated Sept. 4, 1935.

The Board perceives of no reason why constructive residence should suffice for participating in the IRA election under sec. 18, yet not suffice for purposes of receiving land in trust under secs. 5 and 19 of the Act.[11] Further, in view of the fact that all Quinault allottees became bound by the strictures of the IRA, whether or not they voted for its application to the Quinault Reservation,[12] the constructive residence test for secs. 5 and 19 purposes should not be limited to whether or not the allottee voted or was eligible to vote in the IRA election. Just as the General Allotment Act and the Allotment Act of 1911 permitted acquisition of allotments regardless of the allottee's age, the IRA contains no age limitation on eligibility to receive *inter vivos* conveyances of trust land. Accordingly, we hold that any Indian who was allotted land on the Quinault Reservation and who was living on June 1, 1934, constructively satisfies the residency requirement of sec. 19 of the IRA.

---

[8] In the recent Supreme Court decision, *United States* v. *Mitchell*, —— U.S. ——, 100 S. Ct. 1349 (1980), the Court examined the Secretary's trust obligations on the Quinault Reservation as envisaged by Congress in both the General Allotment Act and the Indian Reorganization Act. 100 S. Ct. 1349, 1351, 1358.

[9] In *Halbert*, the Court explained this absenteeism as follows:

"The Act of 1911 does not purport to make the right to an allotment dependent on a personal residence on the reservation. It is a special act relating only to this reservation. The land within the reservation is generally covered with a heavy growth of timber and is difficult of clearing. As a rule the Indians are poor and would be without means of supporting themselves while attempting to clear the land. The treaty secures to them the right of taking fish at all usual and accustomed grounds. Most of them are fishermen, but a few find employment in lumber camps. Most of them have for many years resided in small villages outside the reservation. Some of the villages are within small reservations made by executive orders; but the majority of the Indians have always lived outside any reservation." 283 U.S. 753, 760.

[10] The actual letter of instruction sent by the Agency Superintendent to absentee voters prior to the IRA election stated, among other things:

"[A]lthough you are absent from your reservation you should be entitled to vote on the Indian Reorganization Act * * * provided you are able to sign the enclosed statement to the effect you regard this reservation as your permanent home and legal residence * * *. This vote, or this law, places you under no obligations either to the Government or the tribe as to returning to the community or reservation."

[11] We do not reach the question whether "constructive residence" is sufficient for other matters in which residence may be required under the IRA. In this regard, it is noted that Mr. Van Mechelen, representing an association known as "Indians of the Quinault Reservation," has pursued an administrative appeal through the Commissioner of Indian Affairs concerning the alleged entitlement of such group to formally organize under the IRA. By decision dated Apr. 7, 1980, the Commissioner denied appellants' requested relief, incorporating the views of the Acting Associate Solicitor for Indian Affairs set forth in a memorandum to the Commissioner dated Mar. 18, 1980. Among other things, the Acting Associate Solicitor concluded in the foregoing memorandum: "It does not follow that the constructive residence in 1935 which was sufficient to entitle absent allottees to vote on the application of the IRA is sufficient 'residence' in 1980 to entitle them to demand the right to organize. This is particularly true since the 'constructive residence' of 1935 was based on an intention to return to the reservation, an intention which most of the allottees have not pursued."

In addition to according equal treatment to original allottees of the reservation, the above rule promotes one of the major objectives of the IRA in that it allows reservation land to be preserved in trust status. Under the present policy of the Bureau, appellant in the case at bar could gift deed trust land to his nephew, but the land would have to be conveyed in fee.[13] Further, the rule as stated will narrow the gap between that which can be accomplished through *inter vivos* conveyances and that which can now be done by devise. *See* 25 U.S.C. § 464, *as amended* by the Act of Sept. 26, 1980, 94 Stat. 1207 (P.L. 96-363). This recent enactment is significant in that it was passed by Congress to relax IRA restrictions on the devise of trust property. Sec. 4 of the IRA as initially adopted by Congress permitted the devise of trust property only to the tribe upon whose reservation the land is located, to any member of such tribe, or to any legal heir of the testator. The Act of Sept. 26, 1980, now permits the devise of trust property by an Indian testator governed thereby to the testator's heirs, lineal descendants and to "any other Indian persons for whom the Secretary of the Interior determines that the United States may hold land in trust."

The Board has considered in this appeal whether 25 U.S.C. §§ 465 and 479 could be further interpreted as authorizing *inter vivos* conveyances of trust lands among any Indians possessed of trust allotments on the Quinault Reservation, consistent with the direction Congress has now taken with respect to testamentary conveyances on IRA reservations. We conclude that there is no legal basis for such an extended interpretation of present IRA requirements and that it is for Congress, if appropriate, to equalize the standards for *inter vivos* and testamentary conveyancing of trust or restricted property. The principle that rights and restrictions conferred on original allottees as recipients of trust patents run with the land (*see Estate of Louis Harvey Quapaw*, 4 IBIA 263, 82 I.D. 640 (1975)); *Couch* v. *Udall*, 404 F.2d 97 (10th

---

[12] Thus, for example, all allottees on the Quinault Reservation, whether or not members of the Quinault Tribe, saw legal title to their trust land vested in the United States indefinitely (section 2, IRA).

[13] Presumably, the legitimate aim of the Quinault Tribe to acquire land interests on the reservation is also frustrated when such interests are conveyed to others in fee.

Cir. 1968), has no application here. The "Indian" definitions set forth in 25 U.S.C. § 479 represent specific requirements which must be satisfied on an individual basis. Had Congress intended that any Indian possessed of a trust allotment on an IRA reservation could receive an *inter vivos* gift of similar land, it could easily have so provided.

Therefore, by virtue of the authority delegated to the Board of Indian Appeals under 43 CFR 4.1, the decision of the Acting Deputy Commissioner of Indian Affairs dated Sept. 21, 1979, denying appellant's proposed gift of trust property to his nephew, Daniel L. Van Mechelen, on grounds that such conveyance was prohibited by law, is reversed. This decision is final for the Department.

WM. PHILIP HORTON
Chief Administrative Judge

I CONCUR:

FRANKLIN D. ARNESS
Administrative Judge

U.S. GOVERNMENT PRINTING OFFICE : 1980 - 0 - 332-468 : QL 3

ON-STRUCTURE, DEEP STRATIGRAPHIC TEST WELLS*

M-36922

October 29, 1980

1. Outer Continential Shelf Lands Act: Geological and Geophysical Exploration

A deep stratigraphic test, whether drilled on or off a structure believed to hold oil or gas, is a kind of geological exploration. Therefore, the Secretary has the authority to allow prelease on-structure tests under sec. 11 of the Outer Continental Shelf Lands Act.

To: Secretary
From: Solicitor
Subject: On-Structure, Deep Stratigraphic Test Wells

You have asked me to interpret your authority under sec. 11 of the Outer Continental Shelf Lands Act, as amended. Specifically, you ask whether you may allow permittees to drill a deep stratigraphic test well on a structure before it is leased. As this office has said in the past, you may.

Background

Exxon Co., U.S.A., and the American Petroleum Institute (API) have filed petitions arguing that you lack this authority. Their arguments travel the same path.

They look to the language of the original sec. 11:

> Any agency of the United States and any person authorized by the Secretary may conduct geological and geophysical explorations in the Outer Continental Shelf, which do not interfere with or endanger actual operations under any lease maintained or granted pursuant to this Act, and which are not unduly harmful to aquatic life in such area. [43 U.S.C. § 1340(a)(1).]

The petitioners say that an on-structure, deep stratigraphic test well is not a geological exploration. They support their view by quoting four definitions from the Williams and Meyers *Manual of Oil and Gas Terms* (4th ed. 1976): "geophysical surveys," "exploration," "geological surveys," and "exploratory well." The key to their argument, however, lies in the distinction between the latter two terms. Geological surveys and exploratory wells both include drilling, but surveys drill only to gather information about the rock strata. Exploratory wells, on the other hand, are drilled "for the purpose of ascertaining the presence underground of a commercial petroleum deposit." The petitioners conclude that on-structure test wells are always drilled for the purpose of discovering oil and gas. Therefore, a test well is not a geological exploration.

The petitioners did not quote the Williams and Meyers definition of "stratigraphic test."

Analysis

The Department's authority comes from 43 U.S.C. § 1340(a)(1), the original sec. 11 of the Outer Continental Shelf Lands Act of 1953. The petitioners correctly look to the original statute to see whether the Secretary has the necessary authority, but then they resort selectively to a glossary to support their view. Academicians and legislators often speak different languages, and the language of the Congress is generally better interpreted by its committee reports than by specialized manuals. Judge Learned Hand said it best:

---

*Not in chronological order

> [It is] one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning. *Cabell* v. *Markham*, 148 F. 2d 737, 739 (2d Cir. 1945).

We must first look to the legislative history of the 1953 Act to see what Congress intended the term "geological and geophysical explorations" to encompass.

The Outer Continental Shelf Lands Act of 1953 originated as H.R. 5134. That bill, as introduced on May 12, 1953, proposed to add several new sections to the Submerged Lands Act, May 22, 1953, 67 Stat. 29 (1953). Proposed new § 17 restricted in one respect the rights granted to lessees under an OCS lease:

> Geological and Geophysical Explorations—The right of any person, subject to applicable provisions of law, and of any agency of the United States to conduct geological and geophysical explorations in the outer continental shelf, which do not interfere with or endanger actual operations under any lease issued pursuant to this Act, is hereby recognized. 99 Cong. Rec. 4893 (1953).

At about the same time S. 1901 was introduced in the Senate. 99 Cong. Rec. 4908 (1953). The May 14 version of S. 1901 said nothing about exploration. The Department of Justice, in a letter dated May 26, called this omission to the Senate's attention and suggested that exploration "might well be conditioned on securing a permit from the Secretary." S. Rep. No. 411, 83rd Cong., 1st Sess. 39 (1953). The Senate followed this suggestion and drafted a new § 11 to its bill, using the language that ultimately was enacted. Sec. 11 added two items to the House's § 17: the permit requirement (implicit in the word "authorized") and the requirement that exploration must not be unduly harmful to aquatic life in the area explored. S. Rep. 411, 83rd Cong., 1st Sess. 14 (1953). Although the Senate abandoned S. 1901, it retained most of its provisions as Senate amendments to H.R. 5134. The Conference Report followed the Senate's version. See H. Rep. 1031, 83rd Cong., 1st Sess. (1953).

My reading has revealed nothing to suggest that Congress intended to narrow the meaning of "geological and geophysical explorations." Given the Congressional purpose to reserve the right to explore to any authorized explorer, courts will favor a broad interpretation of the phrase. The question, then, is whether deep stratigraphic test drilling is a form of geological or geophysical exploration. Because the meaning of stratigraphic test drilling was clarified only within the last twenty to thirty years, a brief review of its evolution is in order.

The interest of the oil and gas industry in stratigraphic drilling did not become significant until the 1950's. Before that time, explorers searched underground primarily for abnormal features called "structural traps." These traps, most commonly occurring on salt domes, anticlines, and faults, are disruptions in the earth's strata, caused by forces deep in the earth. These forces have distorted, fractured, and displaced the layers of rock comprising the earth's crust, bringing impermeable rock and permeable rock to rest together. As oil and gas passing through the permeable rock reach the impermeable rock, they begin to accumulate. They are trapped within the permeable strata by the impermeable strata. Explorers searched for these traps (as they do today) with a variety of geological and geophysical techniques, including several kinds of well logs, and seismic, magnetic, and gravity surveys.

But the more these structural traps were explored and developed, the less chance there was to find additional commercial quantities of oil in other structural traps in the future. The number of these traps is finite: so, obviously, as each new one was found, the number of traps remaining to be found decreased. Consequently, explorers realized that they needed to exploit a different kind of trap: the "stratigraphic trap." Stratigraphic and structural traps confine oil and gas in much the same way, but they are created differently. Structural traps, to repeat, are caused by bends, folds, or breaks in the layers of rock underground. Stratigraphic traps are created by changes in the texture of the rock within unbroken layers. The extent to which oil and gas move, or "migrate," underground depends upon how porous and permeable the rock is. Oil and gas moving through porous and permeable rock become trapped when the rock's texture turns non-porous and impermeable. The difference between structural and non-structural traps was important to the oil and gas industry in the 1950's, because existing exploration techniques were not adequate to detect traps created by these changes in texture (or stratigraphy, to use the broader and more scientific term). See Smith, "Stratigraphic Drilling in the Rocky Mountain Area," 17 Oil and Gas Compact Bull. 48, 49 (June, 1958). As a consequence, geologists and geophysicists began to turn to the stratigraphic test to gather the data they needed.

Three articles in the 1958 *Oil and Gas Compact Bulletin* show that, while a precise definition of stratigraphic test drilling lacked universal acceptance, industry agreed on some of the elements of a definition. The first article, by an oil company geophysicist, described a stratigraphic test well as "a hole in the earth for purposes of obtaining information [on] structure, lithology, porosity, and permeability." Smith, above, at 49. The article added that the well should be drilled into potential reservoirs of oil and gas, but nevertheless distinguished between stratigraphic wells and "wildcat" wells:

> A definite drilling program must be designed to isolate the area where a wildcat may be drilled for stratigraphic oil accumulation. In order to do this, the [stratigraphic] test holes must penetrate the prospective oil-or-gas bearing formation. *Id.* at 50.

The second article, by an oil company geologist, admitted that "the term 'Stratigraphic Test' is difficult to define;" but though the author was struggling with his terminology, he basically agreed with the elements described in the first article. Stratigraphic wells and wildcat wells were different:

> [A] strat hole is a hole drilled to obtain lithologic information on units in the subsurface. These data were used * * * to further our geological knowledge, with the end product, of course, the drilling of successful wildcat wells in prospects thus delineated. * * * [I]f a hole has an average chance to produce, and would be completed as a producing well if it was indicated to be a discovery, it is then a wildcat rather than a core hole or a well drilled purely for information. Hart, "Value of Stratigraphic Tests," 17 *Oil and Gas Compact Bulletin* 53 (June, 1958).

But the expense of drilling kept the author from sticking to his definitions. He believed that it was sometimes appropriate to convert a stratigraphic well into a wildcat well (by increasing the size of the hole and completing it for production) if oil were found. "To plug and abandon a hole and redrill in the immediate vicinity is obviously waste." *Id.* at 54. Nevertheless, "strat or core hole programs are designed to obtain information much as are geophysics, surface geology, air photos or any other exploration programs, not as a means of disguising a wildcat." *Id.* The difference between stratigraphic and core holes is that the stratigraphic hole is drilled into "potentially productive horizons" for data on porosity, permeability, lithology; core holes, on the other hand, "are primarily drilled for structural data." *Id.* at 53.

The most important article was the third. It was the report of the Interstate Oil Compact Commission's Committee on Regulatory Practices for Stratigraphic Test Holes. The Committee reported on problems created by the vagueness of state regulations on stratigraphic drilling, with the purpose of drafting model regulations for the states to adopt. Consequently, the Committee considered the variety of meanings of stratigraphic drilling both in the industry and in state regulations. One of the products of this work was a set of standardized definitions:

> *Structure test*—Hole drilled for geologic structure alone, although other types of information may be acquired during the drilling. This type of hole is drilled to a structural datum which is normally short of the known or expected producing zone or zones.
>
> * * * * *
>
> *Stratigraphic test*—Hole drilled for stratigraphic information, including lithology (facies), porosity and permeability. It is drilled to penetrate a potentially productive zone, and thus may result in production.

17 *Oil and Gas Compact Bull.* 43 (Dec. 1958).

These two definitions are used by Williams and Meyers in their *Manual of Oil and Gas Terms* 571, 574 (4th ed. 1976), the book on which the petitioners rely.

This review of the development of the definition of stratigraphic test drilling shows that for many years there has been widespread agreement upon four points. First, a stratigraphic test is an accepted form of geological exploration. Second, its purpose is to gather geological information on the stratigraphy of an area believed capable of holding commercially valuable accumulations of oil or gas. Third, a stratigraphic test is most effective when it is drilled into this area. Fourth, direct evidence of the presence of oil or gas (called a "hydrocarbon show") is the most reliable form of geological information on the presence of oil or gas.

The petitioners try to support their view by invoking the terms of the OCS lease. The lease grants an exclusive right "to drill for, develop and produce oil and gas." They say that if the Secretary may allow prelease, on-structure test wells under § 11, he may also allow explorers to drill these tests on another company's lease. This, they say, would deny lessees the exclusive right to drill for oil and gas.

Sec. 11 itself does not stop the Secretary from allowing on-structure tests on tracts already leased. Whether the language of the lease would prevent this and whether the Secretary has the authority to issue such a lease provision are questions beyond the scope of this opinion.

Conclusion

Deep stratigraphic tests, on or off structures potentially holding oil or gas, are geological explorations within the meaning of 43 U.S.C. § 1340.

Clyde O. Martz
Solicitor

GRAFTON COAL CO., INC.

2 IBSMA 316

Decided *November 4, 1980*

Appeal by the Office of Surface Mining Reclamation and Enforcement from an Apr. 23, 1980, decision of Administrative Law Judge Tom M. Allen in Docket No. CH 0-165-R, vacating Notice of Violation No. 80-I-37-5 and Cessation Order No. 80-I-37-2, issued to Grafton Coal Co., Inc., for an alleged failure to eliminate a highwall in violation of 30 CFR 715.14.

Affirmed as modified.

1. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Generally—Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Specificity

Under the circumstances of this case, it was error for the Administrative Law Judge to vacate a notice of violation on his own motion on the grounds that it lacked reasonable specificity as required by sec. 521(a)(5) of the Act when the parties expressed no confusion about the nature of the alleged violation.

2. Surface Mining Control and Reclamation Act of 1977: Backfilling and Grading Requirements: Generally—Surface Mining Control and Reclamation Act of 1977: Evidence: Generally—Surface Mining Control and Reclamation Act of 1977: State Regulation: Generally

Under the circumstances of this case, sufficient evidence was presented to show that unforeseen circumstances arose during regrading, that the state regulatory authority approved a change to the permit under its established procedures, and that the change was carried out in accordance with the requirements of 30 CFR 715.14(b).

3. Surface Mining Control and Reclamation Act of 1977: State Regulation: Generally

Because OSM is entitled to rely on the permit package as evidence of the conditions under which mining and reclamation have been approved, the failure of a state regulatory authority to require written documentation of approved permit changes to be placed in the permit package exposes a permittee to potential liability under the Act.

APPEARANCES: Harold Chambers, Esq., Office of the Field Solicitor, Charleston, West Virginia, and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Division of Surface Mining, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement; James Rodney Christie, Esq., Clarksburg, West Virginia, for Grafton Coal Co., Inc.; Homer A. Speaker, Esq., Assistant Attorney General, Charleston, West Virginia, for amicus curiae the State of West Virginia.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

The Office of Surface Mining Reclamation and Enforcement (OSM) filed for review of a decision of the Hearings Division vacating Notice of Violation No. 80–I–37–5 and Cessation Order No. 80–I–37–2 for failure to abate the violation listed in the notice. The notice and order were issued to Grafton Coal Co., Inc. (Grafton), for an alleged failure to eliminate a highwall in violation of 30 CFR 715.14. This action was taken pursuant to the Surface Mining Control and Reclamation Act of 1977 (Act).[1] For the reasons discussed below, we affirm the decision as modified.

Background

On Jan. 28, 1980, OSM inspected Grafton's Radabaugh surface mine in Lewis County, West Virginia. Mining and reclamation had been completed and no one was present at the site. OSM issued Grafton Notice of Violation No. 80–I–37–5 on Jan. 31, 1980, for "failure to eliminate highwall" in violation of 30 CFR 715.14 and required the company to "eliminate highwall" on the "area where highwall has not been eliminated" by 8 a.m. on Feb. 29, 1980. Grafton filed an application for review of this notice on Mar. 3, 1980. After a follow-up inspection conducted on Mar. 25, 1980, OSM issued Grafton Cessation Order No. 80–I–37–2 for failure to abate the violation listed in the notice. On Apr. 10, 1980, Grafton filed a petition for temporary relief from the imposition of the $750 per day minimum penalty required by sec. 518(h) of the Act, 30 U.S.C. § 1268(h) (Supp. II 1978). A hearing on the petition was held on Apr. 15, 1980.

---

[1] Act of Aug. 3, 1977, 91 Stat. 445, 30 U.S.C. §§ 1201–1328 (Supp. II 1978).

At the hearing,[2] the OSM inspectors testified that they issued the notice because they believed that about 200 feet of a terrace at the top of the 3,000-foot long backfill on this site was original highwall (Tr. 41–42, 44, 48, 70). Under 30 CFR 715.14 (b)(2)(iii), highwalls may not be left as part of a terrace (Tr. 20, 86). Grafton's engineer visited the site after the notice was issued (Tr. 9–10), but was unable to say whether all of the original highwall was eliminated before the terrace was constructed (Tr. 16). The State inspector who visited the site periodically during the mining process testified for Grafton that the highwall was completely eliminated and the terrace was cut into the backfill material (Tr. 29–30).

The permit for this site was issued in June 1978 (Tr. 14). It did not provide for a terrace (Tr. 11). The terrace was a drainage control measure planned during the regrading process (Tr. 11) and approved by the State inspector in the field. According to the inspector, the final plan was acceptable to the State (Tr. 21, 24, 27, 34). Grafton had been issued a grading release and about 82 percent of the bond had been returned (Tr. 13, 24).

At the close of the hearing, the Administrative Law Judge held that, under the Board's decision in *Old Ben Coal Co.*, 2 IBSMA 38, 87 I.D. 119 (1980), the notice of violation issued to Grafton lacked reasonable specificity as required by sec. 521(a)(5) of the Act because it did not state which areas along the terrace were original highwall and had to be reclaimed (Tr. 100–101). He also found that there was, in fact, no original highwall remaining (Tr. 101–102). He issued an order from the bench vacating the notice and, consequently, the cessation order, on those two grounds (Tr. 108).

The Apr. 23, 1980, written confirmation of the decision from the bench reiterated the two grounds for vacation (Decision at 4–5). It furthermore stated that the regulatory authority's approval of the grading, release of the bond, and verbal requirement to construct a terrace, "amounts to the type of approval which is contemplated by the Act but which probably should have been in writing" (Decision at 5).

---

[2] Although this hearing was described and conducted as a temporary relief hearing, the Administrative Law Judge issued a decision on the merits at its conclusion. In *Cravat Coal Co.*, 2 IBSMA 136, 87 I.D. 308 (1980), the Board vacated that part of a decision granting permanent relief on the merits when OSM objected that it was not given notice that a final decision would be rendered at the temporary relief hearing and so had not presented its entire case. While the Board still holds that 43 CFR 4.1123 requires that the parties be given advance notice of the nature of the hearing, it declines to vacate the decision on that ground when the potentially disadvantaged party, in this case OSM, has not objected to the procedure.

OSM filed a notice of appeal of this decision on May 27, 1980. In its brief, filed on July 7, 1980, OSM argues that *Old Ben Coal Co.*, *supra*, does not control this case and that the State regulatory authority did not properly approve the construction of a terrace on this site. Grafton filed a reply brief on Aug. 5, 1980.

On Sept. 4, 1980, the Board ordered further briefing on the authority of a West Virginia state inspector to approve permit changes. An amicus curiae brief was also requested from the State. OSM and the State responded to this order.

Discussion and Conclusions

[1] The Administrative Law Judge gave two reasons for vacating the notice and order in this case. The first ground was that the notice lacked reasonable specificity as required by sec. 521(a)(5) of the Act and *Old Ben Coal Co., supra.* Notice of Violation No. 80–I–37–5 was reasonably specific: although exact details may not have been given, the notice informed Grafton of the nature of the alleged violation. Grafton did not indicate any confusion arising from the notice. If the Administrative Law Judge had questions about the nature of the alleged violation, he could have sought clarification for himself, but it was error for him to vacate the notice on this ground on his own motion when the parties expressed no doubts about what was being charged.

The second ground given for vacation was the finding of fact that the highwall was completely eliminated before the terrace was constructed. This finding is relevant only if the construction of a terrace was properly approved by the State regulatory authority as required by 30 CFR 715.14(b)(2). The terrace was not part of the permit as originally approved. Instead, it was a change made during the regrading process in the field and orally approved by the State inspector reviewing this site. OSM argues that sec. 715.14(b)(2) and the West Virginia surface mining law require that permit modifications must receive the prior written approval of the Director of the Department of Natural Resources, the regulatory authority in West Virginia. Therefore, OSM contends that the inspector was without authority to approve the change. In its amicus curiae brief, the State indicates that it interprets its statute and regulations to permit inspectors to authorize minor regrading deviations because of unforeseen circumstances arising during regrading. These changes can apparently be made orally, although, in this case, the State says that the grading release was tantamount to written approval.

[2, 3] Sufficient evidence was presented to show that unforeseen circumstances arose during the course of regrading, necessitating a change from the permit as approved (Tr.

10), and that the State regulatory authority approved that change in accordance with its standard procedures (Tr. 29–30; Brief of West Virginia).[3] There was also sufficient evidence from which the Administrative Law Judge could conclude that the original highwall had been completely eliminated before the construction of the terrace (Tr. 29–30).[4] For these reasons, the decision below vacating the notice and order on the grounds that the highwall had been eliminated is affirmed.

Therefore, the Apr. 23, 1980, decision vacating Notice of Violation No. 80–I–37–5 and Cessation Order No. 80–I–37–2 is affirmed as modified.

Melvin J. Mirkin
Administrative Judge

Newton Frishberg
Administrative Judge

Will R. Irwin
Chief Administrative Judge

APPLICATION OF THE ENDANGERED SPECIES ACT TO NATIVE AMERICANS WITH TREATY HUNTING AND FISHING RIGHTS

M–36926

November 4, 1980

Endangered Species Act of 1973: Generally

The Endangered Species Act of 1973, including the taking prohibitions of sec. 9, applies to Native Americans exercising treaty hunting and fishing rights.

Indians: Hunting and Fishing

Indian hunting and fishing rights, created by treaty or otherwise, do not include the right to take species which have been listed as threatened or endangered pursuant to the Endangered Species Act of 1973.

To: Assistant Secretary, Fish and Wildlife and Parks
Assistant Secretary, Indian Affairs

From: Solicitor

Subject: Application of the Endangered Species Act to Native Americans with Treaty Hunting and Fishing Rights

Introduction

This opinion addresses the question of whether the Endangered Species Act of 1973 (ESA) applies to Native Americans in their exercise of any hunting or fishing rights pursuant to a treaty with the United States or pursuant to a statutory or aboriginal right, or an executive order. I am mindful that hunting and fishing rights of Indians have been a source of both litigation and social tension, especially during the last decade, and in this context have examined the interests of the United States in protecting endangered fish and animal species, where they may conflict with traditional hunting and fishing rights.[1]

---

[3] This is not to suggest that the Board approves of the procedure followed by the State in this case. The permit package is intended to give notice of the conditions under which mining and reclamation have been approved. Any change from the approved permit, regardless of how minor, should simultaneously be documented in writing in the permit package, setting forth the reasons and justifications for and the nature of the change and the new conditions to be followed. Where appropriate, technical data should be presented. When such a document is not part of the permit package, OSM is justified in taking any appropriate enforcement action against the operation. Thus, the failure of the State to require documentation of changes exposes its permittees to potential liability under the Act.

[4] Even if a change is documented in th permit package, if the reasons for the change are not shown to be acceptable under the Act, or if all other required conditions of the Act are not met, a notice or order should be sustained. *Cedar Coal Co.*, 1 IBSMA 145, 86 I.D. 250 (1979).

Many Indian treaties reserve the right of hunting and fishing either on reservations or at traditional hunting or fishing locations or both. Even where an Indian reservation has been terminated by Congress, the treaty hunting and fishing rights survive termination. *Menominee Tribe* v. *United States*, 391 U.S. 404 (1968). Such rights are exercised in a spectrum ranging from takings for religious or recreational purposes to the operation of commercial fisheries. Whether or not specific individuals have a right to exercise tribal treaty rights is a question which must be examined on a case by case basis. It depends on a number of questions such as the nature of the treaty right, the status of the individual, the nature of the taking, and any applicable conservation statutes or regulations. All of these factors must be considered in examining treaty hunting and fishing rights in specific cases.[2]

It is my opinion, based on Supreme Court analysis of Indian treaty hunting and fishing rights, that as a matter of law, Indian treaty rights do not extend to the taking of threatened or endangered species and that even if treaty rights allow the taking of endangered and threatened species, then those rights may have been abrogated or modified by Congress through the ESA. (See discussion p. 533, *infra.*)

The ESA contains one major provision, sec. 9, which is most important with respect to the Act's application to Indian hunting and fishing rights. Sec. 9 of the Act contains the prohibitions on the taking of endangered species:

> Sec. 9. (a) General.—(1) Except as provided in sections 6(g)(2) and (10) of this Act, with respect to any endangered species of fish or wildlife listed pursuant to section 4 of this Act it is unlawful for any person subject to the jurisdiction of the United States to—
>
> (A) import any such species into or export any such species from the United States;
>
> (B) take any such species within the United States or the territorial sea of the United States;
>
> (C) take any such species upon the high seas;
>
> (D) possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species taken in violation of subparagraphs (B) and (C);

---

[1] Reference to "endangered" species in this memorandum encompasses both threatened and endangered species. In large part, the prohibitions against taking endangered species are applied to threatened species as well. See 16 U.S.C. § 1533(d); 50 CFR § 17.31.

[2] Indian hunting and fishing rights can also be created by statute, executive order or agreement where they are not otherwise reserved in a specific treaty. We will refer hereinafter to rights recognized in these three fashions as "treaty" rights.

(E) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species;

(F) sell or offer for sale in interstate or foreign commerce any such species; or

(G) violate any regulation pertaining to such species or to any threatened species of fish or wildlife listed pursuant to section 4 of this Act and promulgated by the Secretary pursuant to authority provided by this Act.

Given the intent and character of this statute, it is clear that but for assertions of treaty hunting and fishing rights, sec. 9 of the ESA would, without qualification, apply to all Indians.[3] Sec. 9(a) applies to "*any person* subject to the jurisdiction of the United States." (Italics added.) American Indians are clearly subject to the jurisdiction of the United States.[4]

Indian treaty rights do not include the right to take species of fish or wildlife which are threatened with extinction.

There is a rule of construction which directs that a statute and an Indian treaty must be construed in harmony, to the extent possible. *Payne* v. *United States*, 264 U.S. 446, 448 (1924). There is another rule which states that treaties are not to be construed to the detriment of the Indians, *Choctaw Nation* v. *United States*, 318 U.S. 423, 432 (1943); *Shoshone Indians* v. *United States*, 324 U.S. 335, 353 (1945), and a third rule which states that abrogation or modification of treaty rights by Congress are not to be lightly imputed. *Menominee Tribe* v. *United States*, 391 U.S. 404, 412 (1968). The question of abrogation or modification need not even arise if there is no irreconcilable conflict between a treaty and the statute. *See* Coggins, *Native American Indians and Federal Wildlife Law*, 31 Stanford L. Rev. 375 (Feb. 1979). It is my opinion that the Endangered Species Act is in complete harmony with the exercise of treaty hunting and fishing rights by Indians because those rights do not include the right to take endangered or threatened species and thus application of the Act to Indians does not restrict or abrogate their treaty rights. It is also my position that when various Indian tribes and the United States entered into treaties reserving hunting and fishing rights in the

---

[3] With the exception, of course, of certain Alaska Natives, Sec. 10(e), 16 U.S.C. § 1539 (e).

[4] A specific example of the kind of sec. 9 problem encountered by this Department is that which was the subject of a memorandum of Mar. 11, 1977, from the Division of Conservation and Wildlife to the Deputy Solicitor concerning the killing of a Northern Rocky Mountain Wolf on the Blackfoot Reservation in Montana, allegedly by an enrolled member of the Blackfoot Tribe. The wolf has been listed as endangered since June 4, 1973, but the confusion over the scope of the ESA in dealing with Indian treaty hunting and fishing rights has prevented effective investigation or prosecution of this case. There have also been a number of such disputes concerning the killing of eagles.

Indians, they did not even contemplate whether this right extended to the taking of a species which was on the brink of extinction.

This position was implicitly taken by the United States Supreme Court in *Washington Game Department* v. *Puyallup Tribe*, (*Puyallup II*), 414 U.S. 44, 49 (1973) where Justice Douglas, in upholding Indian treaty fishing rights, stated:

> We do not imply that these fishing rights persist down to the very last steelhead in the river. Rights can be controlled by the need to conserve a species, and the time may come when the life of a steelhead is so precarious in a particular stream that all fishing should be banned until the species regains assurance of survival. The police power of the State is adequate to prevent the steelhead from following the fate of the passenger pigeon; and the *Treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets.* (Italics added)

Puyallup II was one of a number of decisions by the Supreme Court concerning a chronic dispute between a number of tribes and the State of Washington over treaty hunting and fishing rights. Those cases established that (1) the State, pursuant to its police power, has the right to regulate off-reservation fishing where the regulation is reasonable and necessary for conservation, *Puyallup Tribe* v. *Washington Game Department*, 391 U.S. 392, 398 (1968) (*Puyallup I*); (2) any regulations promulgated by the State as reasonable and necessary for conservation purposes may not discriminate against Native Americans who hold valid treaty hunting and fishing rights, *Washington Game Department* v. *Puyallup Tribe*, 414 U.S. 44, 48 (1973) (*Puyallup II*); (3) reasonable and necessary State conservation regulations may apply to Indian hunting and fishing on the reservation as well as off. *Puyallup Tribe* v. *Washington Game Department*, (*Puyallup III*), 433 U.S. 165, 171 (1977).

Puyallup I made it clear that Indian treaty rights did not foreclose state regulation for conservation purposes. This is discussed in more detail below. *Puyallup II* and *III*, however, are particularly relevant to the present issue. In *Puyallup II*, the Court, while recognizing the regulatory power of the State, held that the State could not ban all commercial fishing of salmon and steelhead since this action would deprive treaty-fishermen of a share of those fish runs taken by sports fishermen who are predominantly non-Indian. This, the Court held, was discriminatory. 414 U.S. at 48. The Court nonetheless accepted the State's prohibitory regulation approach for the purpose of conservation and only ordered apportionment of those fish whose escapement would not be necessary for the "perpetuation of the species." *Id.* Thus, an implicit holding of *Puyallup II* is that Indian treaty rights do not allow the taking of declining species where reasonable and necessary nondiscriminatory State conservation regulations prohibit such taking.

This analysis is not limited to the argument that there is regulatory power in the State. Rather it means that treaty rights do not give treaty fishermen the right to such taking. This is made clear by Justice Douglas' express admonition in *Puyallup II*, quoted above. This finding was reemphasized in *Puyallup III* where the Court rejected the Indians' claim "to an exclusive right to take steelhead while passing through their reservation." 433 U.S. at 176. Thus, as a matter of law, Indian treaty rights do not include the right to take species which are endangered or threatened with extinction.

This principle was recently reaffirmed by the Supreme Court in *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n.*, 443 U.S. 658 (1979). The issue in *Washington* was the right of the Yakima Indians to an apportioned amount of the salmon and steelhead runs in the State. In upholding that right, the Court observed that Indian treaties "secure the Indians' right to take a *share* of each run of fish that passes through tribal fishing areas." 433 U.S. at 679 (Italic added). The Indians' right to take a "share" was not viewed as a right to an uncontrolled, exclusive taking. The Court, referring to its earlier *Puyallup* decisions, rejected that proposition:

> [W]e *unequivocally rejected* the Tribes' claim to an untrammeled right to take as many of the steelhead running through their reservation as they chose. *Id.* at 684 (Italics added).

The critical point to be made here is that even though these treaties expressly reserved an equal fishing right on the part of nontreaty fishermen, that was not the basis for the Court's balancing of the Indians' treaty rights against the State's power to regulate. That balance recognized the police power of the State to conserve wildlife as an inherent State power and *not* simply a result of the State's citizens having equal fishing rights under the treaty.[5] It was the State's police power to conserve, and not the terms of the treaty, which authorized the fishing prohibition approved by the Court in *Puyallup II*, 414 U.S. at 49. Although it overturned that part of the State's program which discriminated against the treaty fishermen, the Court nevertheless recognized that treaty hunting and fishing rights simply do not allow Indians to avoid the reach of authorized, nondiscriminatory conservation prohibitions which are necessary to preserve fish and wildlife resources. Although in *Puyallup II* this prohibition was in the form of a *State* regulation, the taking prohibition was viewed by the Court as not infringing upon any Indian treaty right. This determination did not turn on the source of the sovereign's regulating authority.

---

[5] The treaty in *Puyallup* was one of the "Stevens" treaties entered into the Pacific Northwest which contained "in common" language, giving nontreaty fishermen equal rights to take fish off-reservation.

This conclusion is further compelled by this Department's responsibility, recently recognized by the Assistant Secretary for Indian Affairs, to preserve Indian wildlife resources for future generations of Indians. *See* Memorandum of June 18, 1980 from Assistant Secretary of Indian Affairs to the Fish and Wildlife Service.

The special responsibility of the Secretary to Indians compels regulation of Indian hunting and fishing pursuant to a treaty. This responsibility obligates the United States to take all reasonable and necessary steps to protect the hunting and fishing rights of *future* tribal members from being squandered by the "untrammeled" pursuit of endangered species by *present* tribal members. *Cf. Seminole Nation* v. *United States*, 316 U.S. 286, 297 (1942); *Eastern Band of Cherokee Indians* v. *North Carolina Wildlife Resources Commission*, 588 F. 2d 75 (4th Cir. 1978). Failure to act could be deemed a dereliction of the Secretary's special responsibilities since a treaty hunting or fishing right loses all realistic value if the game species upon which it is focused is allowed to suffer the fate of the passenger pigeon. The only practical means of protecting these resources is, of course, regulation, as the BIA has recognized in its Indian fishing regulations, *e.g.*, 25 CFR 255, 256, 258.

This analysis does not involve any abrogation of treaty rights but instead simply makes them subject to regulatory control for the purposes of the conservation of endangered or threatened species, thus insuring the perpetuation of the hunting and fishing rights of future generations of Native Americans. Any other conclusion would render the Act impotent and could seriously jeopardize the continued existence of many endangered species to the advantage of no one. It is also my opinion that since temporary control under the ESA respects and attempts to preserve the rights of future generations of Indians to hunt and fish under their respective treaties, the reasonableness and necessity of such an interpretation is readily apparent.[6] This approach ultimately preserves the rights of the Indians while at the same time addressing the critical wildlife problem recognized by Congress in the ESA. Such regulation is indispensable for the survival of these species and for the conservation of these species for future generations of Indians pursuant to the special responsibilities of the United States.

---

[6] An example of the long term benefits from such regulation is the American alligator. Due to inadequate state regulatory controls, the federal government listed the alligator once faced with extinction as endangered and prohibited all further takings in 1973. As a result of these federal regulatory controls, the alligator has now made a significant recovery and has actually been taken off the endangered species list altogether in certain parts of the country. See *e.g.*, 45 F.R. 52849 (Aug. 8, 1980). Thus, through temporary restrictions on the public's ability to take American alligators, the survival of the species has been assured and the need for further taking prohibitions has been eliminated. We contend that a similar short-term restriction/long-term species enhancement equation should be held to apply to Indian hunting and fishing involving endangered or threatened species. To the extent that all secretarial actions under the ESA must be designed to facilitate the recovery of the species with a concomitant elimination of continued federal protection, we contend that the ESA's regulation of Indian hunting and fishing rights must presumptively be viewed as short term in nature and not permanent.

A related point can be made based on the perspective of the Supreme Court. The Court has repeatedly directed in the *Puyallup* cases, *supra*, as well as in *Washington* v. *Washington*, *supra*, that where legitimate wildlife conservation interests of the State are concerned, Indian treaty rights either do not exist, or can be closely regulated and controlled. On the other hand, the Court has recognized no flexibility in dealing with the mandates of the Endangered Species Act and has recognized the critical need for strict and universal application of that law's safeguards. *TVA* v. *Hill*, *supra.* If the treaty rights and ESA can be considered reconcilable, and we submit that they can, the ESA's purposes and obligations must attach rigorously to treaty as well as non-treaty users of wildlife resources. If such regulation is not applied then the United States will be precluded not only from protecting these species, but also from preserving and restoring them for future use by Indians. Both sides would be losers where reasonable and necessary regulations could have protected all interests. Failure to regulate takings would defeat the treaty rights of all parties, the intent of Congress, and the public interest.

It is also significant that the general circumstances of treaty negotiation in the nineteenth century would not have led any of the parties to even form an intention on this issue. The Supreme Court noted the need to interrupt Indian treaties to reflect the original intentions of the parties in *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978):

> These instruments, which beyond their actual text form the backdrop for the intricate web of judicially made Indian law, cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them.

The historical context of Indian treaty negotiations demonstrates that neither the United States nor the Indian signatories ever contemplated the biological and legal circumstances in which we find ourselves.

The Supreme Court, in an analysis of the nature of Indian treaty hunting and fishing rights, recognized and discussed the historical and factual background of the treaty with the Yakima Indians in *Washington* v. *Washington State Commercial Passenger Fishing Vessel Association*, *supra*, examining the history of the treaty and the intent of the parties:

> Because of the great abundance of fish and the limited population of the area, it simply was not contemplated that either party would interfere with the other's fishing rights. The parties ac-

> cordingly did not see the need and did not intend to regulate the taking of fish by either Indians or non-Indians, nor was future regulation foreseen.
>
> In sum, it is fair to conclude that when the treaties were negotiated, neither party realized or intended that their agreement would determine whether, and if so how, a resource that had always been thought inexhaustible would be allocated between the native Indians and the incoming settlers when it later became scarce.
>
> * * * * *
>
> Unfortunately, that resource has now become scarce, and the meaning of the Indians' treaty right to take fish has accordingly become critical.
>
> *Id.* 443 U.S. at 668, 669.

In such an historical context the parties to the treaties could not have anticipated the subsequent depletion of various species and the need to protect such species through the Endangered Species Act. In the *Washington* case, the Court dwelt on this at length in consideration exactly what the scope of the Indians "right of taking fish was." Again, in examining the parties' intent regarding the treaty, the Court stated:

> At the time the treaties were executed there was a great abundance of fish and a relative scarcity of people. No one had any doubt about the Indians' capacity to take as many fish as they might need. 443 U.S. at 675.

Under the Act, an "endangered" species is one "which is in danger of extinction throughout all or a significant portion of its range." Sec. 3(6). A "threatened" species is one "which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." Sec. 3(20). To allow exclusive, unrestricted hunting and fishing of these species pursuant to alleged treaty rights would not only threaten these species with extinction, but would ironically eliminate the source of any rights which did exist. *Kennedy* v. *Becker*, 241 U.S. 556, 563 (1916).

The *Kennedy* Court observed that such a situation, rather than maintaining the sovereignty of the Indians, would instead deny such sovereignty to both the Indians and the State, each being "free to destroy the subject of the power." 241 U.S. at 563.[7]

Destruction of a species would preclude conservation and restoration of that species to levels where it could again be hunted by treaty and non-treaty fishermen. As the Supreme Court observed in *TVA* v. *Hill*, *supra*, 437 U.S. at 180, the Act is intended:

> to bring any endangered species to the point at which the measures provided pursuant to this Act are no longer necessary.

This approach is the most reasonable line of interpretation since any other conclusion necessitates the argument by Native Americans that they have a right to hunt a species to extinction—a construction (1) which has been repeatedly rejected by the Supreme Court, (2) which would completely frustrate the intent of Congress and the broader public interest under the Endangered Species Act, (3) which would destroy a resource which should be preserved for future generations of Indians and non-Indians, and (4) which would not have been contemplated by 19th century treaty-makers.

---

[7] See also, *United States* v. *Fryberg*, 622 F.2d 1010 (9th Cir. July 7, 1980). In a memorandum of May 9, 1977 to the Solicitor, p. 3 n. 2, the Acting Associate Solicitor for Indian Affairs concurred in this view observing that "neither party can destroy the subject matter of the treaty."

This view is supported by a May 28, 1980 memorandum from the Acting Deputy Assistant Secretary for Indian Affairs to the Director of Fish and Wildlife Service which stated that "traditional Indian religions share a basic concern with the [Fish and Wildlife] Service—to ensure the continued well-being of the Nation's fish and wildlife and habitat."[8]

Given this express importance of fish and game to Native American's, the special relationship with the Indians of the United States, the federal obligation to preserve wildlife resources for future generations, and the delicate status of the species listed as endangered or threatened, even without the convincing Supreme Court opinions in the fishing rights cases, it would be clear that neither the Indians nor the United States ever intended or even contemplated that such treaty rights extended so far as to allow Native Americans to take a species which was threatened with extinction. Accordingly, it is my opinion that Native American treaty hunting and fishing rights were never intended to include the right to take a species whose very existence is threatened or endangered, since the statutes and regulations which protect those species are clearly reasonable and necessary for the conservation of those species.

To the extent such rights exist, they may have been abrogated or modified by the ESA.

There is also authority for the proposition that such treaty hunting and fishing rights may have been abrogated or modified by Congress when it enacted the Endangered Species Act.

The general rule, endorsed by this Department, 78 I.D. 19 (Feb. 1, 1971) and the leading authority on Indian Law, Cohen, Federal Indian

---

[8] I think it is interesting to cite Chief Weninock of the Yakimas who were parties to one of the much litigated Stevens treaties in the Pacific Northwest. In 1915, speaking of the hunting and fishing to which he was accustomed, he said:

"Then the Creator gave us Indians Life; we walked, and as soon as we saw the game and fish we knew they were made for us * * * We had the fish before the Missionaries came, before the White man came * * * This was the food on which we lived. My mother gathered berries; my father fished and killed the game * * * My strength is from the fish; my blood is from the fish, from the roots and berries. The fish and the game are the essence of my life."

Proceedings of the New Jersey Historical Society, New Series, vol. 13, 1928, pp. 477–479, cited in McLuhan, T. C., *Touch The Earth*, Outerbridge and Dienstfrey (New York 1971), p. 10. Ms. McLuhan's collection has numerous statements by various Indian chiefs which almost create a presumption against an intention on the part of the Indians to eliminate a species. *Id.*, p. 45 (Oglala Sioux); 49 (Micmac); 53 (Blackfoot); 67, 71 (Sioux).

Law, 147, n. 224 (1st ed. 1942), is that federal laws of general application apply to Indian country and Indian property interests. *FPC* v. *Tuscarora Indian Nation*, 362 U.S. 99, 120 (1960).

In each case, the inquiry is whether Congress' intent to modify or abrogate treaty obligations can be derived from the statute and the surrounding circumstances. *Rosebud Sioux Tribe*, *supra*, 430 U.S. at 586–587. Nonetheless such a finding must be sufficiently compelling to defeat the presumption against such abrogation or modification. *Menominee Tribe*, *supra*, 391 U.S. at 412.

The congressional intent of the ESA and the scheme for its enforcement were found to be compellingly clear in *TVA* v. *Hill*, 437 U.S. 153, 172–184 (1978). Congress' purpose was to protect against the loss of animal and plant species, a loss which that body saw as incalculable. There is no real dispute over this intent and purpose.

There are however, no cases specifically ruling on any implied modification or abrogation of treaty hunting and fishing rights by the ESA, but two circuit courts have ruled on the issue with respect to the Bald and Golden Eagle Protection Act, 16 U.S.C. § 668 *et seq.* In *United States* v. *Fryberg*, 622 F. 2d 1010 (9th Cir. 1980), the court held that to the extent that treaty hunting and fishing rights were inconsistent with the Eagle Protection Act, Congress' intent, determined through the statute's purpose and the surrounding circumstances, modified those rights. In *United States* v. *White*, 508 F. 2d 453 (8th Cir. 1974), the court rejected this argument, holding that Congress must expressly abrogate such treaty rights and since the Eagle Protection Act had not done so, there was no abrogation.[9]

The *Fryberg* case has been appealed to the United States Supreme Court. Any resolution of that case by the Court would certainly have a bearing on the application of the ESA to Native Americans exercising hunting and fishing rights. If and when such a decision is reached, this office, of course, will reexamine the issue in light of any Supreme Court holdings.[10]

---

[9] In *Fryberg*, the court held that the Eagle Act applies to Native Americans exercising treaty hunting and fishing rights and that reasonable conservation statutes can apply to Indian treaty rights when (1) the sovereign exercising its police power has proper jurisdiction; (2) the statute is nondiscriminatory and applies to both treaty and non-treaty persons; and (3) the application of the statute to treaty rights is necessary to achieve its conservation purposes. 622 F. 2d at 1015. In so holding, the Ninth Circuit rejected the Eighth Circuit reasoning of *United States* v. *White*, and applied the type of analysis that the Supreme Court applied in the *Puyallup* cases. A number of cases are in accord with *Fryberg*. *United States* v. *Top Sky* cases, 547 F. 2d 483 484 (9th Cir. 1976), and 547 F. 2d 486, 488 (9th Cir. 1976). ("The Bald Eagle Protection Act is a federal statute of general applicability making actions criminal wherever and by whomever committed." *Accord.*, *United States* v. *Allard*, 397 F. Supp. 429, 431 (D. Mont. 1975). Also of note is the case of *United States* v. *Cutler*, 37 F. Supp. 724 (D. Idaho 1941), where the court held than an Act of Congress—the Migratory Bird Treaty Act, 16 U.S.C. § 703, *et seq.*—could not modify an Indian treaty right. *Contra*, *Thomas* v. *Gay*, 169 U.S. 264, 271 (1898); *United States* v. *Washington*, 384 F. Supp. 312, 411 (W.D. Wash. 1974); affirmed, 520 F. 2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976).

Conclusion

The Endangered Species Act applies to Native Americans because treaty hunting and fishing rights simply do not include the right or power to take threatened or endangered species.[11] In the alternative, such application could also be made by a court if it found that the purpose and surrounding circumstances of the Endangered Species Act are sufficiently compelling and comprehensive to effect a modification or abrogation of those rights by Congress.

This opinion was prepared by the Division of Conservation and Wildlife of the Office of the Solicitor, Associate Solicitor, Gary Widman, in conjunction with the Division of Indian Affairs, Associate Solicitor, Hans Walker. The principal author was David C. Cannon, Jr.

CLYDE MARTZ
Solicitor

UNITED STATES
v.
CAMERON CATLIN BOHME ET AL.
UNITED STATES
v.
EXXON CORP. ET AL.
UNITED STATES
v.
AIDABELLE BROWN ET AL.
(SUPPLEMENT)

51 IBLA 97

Decided *November 5, 1980*

Supplemental proceeding by Order of the United States District Court for the District of Colorado, dated Aug. 13, 1980, to determine whether various oil shale placer mining claims are supported by a qualifying discovery of a prospective valuable mineral deposit. Colorado Contest Nos. 658, 659, 660.

Some claims in Contest No. 658 held supported in part by discovery. All claims in Contest No. 659 held null and void for lack of discovery. All claims in Contest No. 660 held supported by discovery.

1. Mining Claims: Generally—Mining Claims: Determination of Validity—Mining Claims: Discovery: Market-

---

[10] This Department argued for the position approved in *Fryberg* when the prosecution of Fryberg was authorized by Deputy Solicitor Ferguson, but it will of course, be guided by any future judicial opinions on point.

[11] This approach has recently been taken by the United States District Court for the Western District of Washington on Sept. 26, 1980, in the case of *United States* v. *Washington*, Civil No. 9213—Phase II. The court held that the Indian tribes' allocation included fish released from hatcheries and that the State of Washington may not take any environmentally degrading action which would destroy the fishery habitat and impair treaty rights. In so holding, the court stated that the State's power to impose conservation measures to preserve the resource was an "implicit limitation" on the Indians' treaty fishing right. Slip opinion at 12. The court observed that "[t]he most fundamental prerequisite to exercising the right to take fish is the existence of fish to be taken." *Id.* at 21. The opinion clearly stands for the proposition that neither the State nor the tribes may take any action which destroys the fish—the very source of the treaty right.

ability—Mining Claims: Marketability—Mining Claims: Placer Claims

Under *Andrus v. Shell Oil Co.*, —— U.S. ——, 64 L.Ed.2d 593 (1980), 48 U.S.L.W. 4603 (June 2, 1980), oil shale is a prospectively valuable mineral and therefore present marketability need not be shown to demonstrate discovery.

2. Mining Claims: Generally—Mining Claims: Determination of Validity—Mining Claims: Discovery: Generally—Mining Claims: Placer Claims

To demonstrate a sufficient discovery of oil shale under *Freeman* v. *Summers*, 52 L.D. 201 (1927), a mining claimant must show that mineral was disclosed on or before Feb. 25, 1920, in such situation and such formation that he or she can follow the deposit to depth with reasonable assurance that paying minerals will be found. An isolated bit of mineral, not connected with or leading to substantial prospective values, does not constitute a discovery.

3. Mineral Lands: Determination of Character of—Mining Claims: Lands Subject To

A single discovery of mineral within a placer mining claim does not conclusively establish the mineral character of all the land included in the location. Whether the land embraced in the claim is mineral in character is an issue which remains open to investigation and determination by the Department until patent issues. The contestee must establish that each 10-acre tract within the entire claim is mineral in character, failing in which any nonmineral 10-acre tract is properly excluded from the patent application.

4. Mining Claims: Determination of Validity—Mining Claims: Discovery: Geologic Inference

Under *Freeman* v. *Summers*, 52 L.D. 201 (1927), an exposure of the Parachute Creek member, even though of limited extent, can be geologically inferred to embrace sufficient quantity of high grade oil shale so as to constitute a valuable mineral deposit.

Freeman v. Summers, 52 L.D. 201 (1927), is reinstated.

APPEARANCES: John Savage, Jr., Esq., Rifle, Colorado, for appellants in Contest No. 658; James Clark, Esq., and Bruce Pringle, Esq., Denver, Colorado, for appellants in Contest No. 659; H. Michael Spence, Esq., Denver, Colorado, Fowler Hamilton, Esq., and Richard W. Hulbert, Esq., New York, New York, and Donald L. Morgan, Esq., Washington, D.C., for appellants in Contest No. 660; Lowell L. Madsen, Esq., and Marla E. Mansfield, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Government.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

INTERIOR BOARD OF LAND APPEALS

The above-captioned cases are before the Interior Board of Land Appeals by Order of the United States District Court for the District of Colorado, dated Aug. 13, 1980. In this supplemental proceeding the Board is directed, with the consent of the parties hereto, to rule on the issue of whether the subject unpatented oil shale placer mining claims are each supported by a qualifying discovery of a mineral deposit.

These consolidated cases were the subject of the decision *United States* v. *Bohme*, 48 IBLA 267, 87 I.D. 248

(1980), in which the principal question presented by stipulation of the parties was whether contestees had substantially complied with the requirement of 30 U.S.C. § 28 (1976), that annual assessment work in the amount of $100 be performed for the benefit of each claim. We affirmed Administrative Law Judge Harvey C. Sweitzer's dismissal of the complaint against the Compass claims, and that portion of his decision holding the Carbon and Elizabeth claims invalid on the asserted ground. His dismissal of the complaint against the Oyler claims was reversed and those claims declared invalid.

In these final Departmental proceedings upon the issue of discovery, we are instructed that the record in *Andrus* v. *Shell Oil Co.*,[1] ____ U.S. ____, 64 L.Ed.2d 593 (1980), 48 U.S.L.W. 4603 (June 2, 1980), shall be considered part of the record in this proceeding. *See* Part B, Paragraph I, of Order of United States District Court, dated Aug. 13, 1980.

As before, the several groups of contestees shall be referred to by contest number, or by the claim group names. With respect to evidentiary citations, "W" denotes the administrative hearing record before Administrative Law Judge Dent D. Dalby in *United States* v. *Winegar*, *infra.* "B" denotes the evidence adduced at the District Court trial of these matters; "P" and "D" refer, of course, to contestee/plaintiffs and to the Government as defendant in that trial.

Until the enactment of the Mineral Leasing Act of Feb. 25, 1920 (Leasing Act), 30 U.S.C. § 181 (1976), oil shale was a locatable mineral. That Act withdrew oil shale, among other minerals, from location and purchase under the Mining Law of 1872, subject to the savings clause of sec. 37, 30 U.S.C. § 193 (1976), which provides in material part:

> The deposits of * * * oil shale, * * * herein referred to, in lands valuable for such minerals, * * * shall be subject to disposition only in the form and manner provided in this chapter, except as to valid claims existent on February 25, 1920, and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery.

Under the mining law, discovery of a valuable mineral deposit is the *sine qua non* for a valid mining claim. Through the years since enactment of the mining statute, the Department and the courts have held that a discovery of a valuable mineral deposit has been made where minerals have been disclosed and the evidence is of such quantity and quality that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine. *United States* v. *Coleman*, 390 U.S. 599, 602 (1968); *Cameron* v. *United States*, 252 U.S. 450, 460 (1920); *Chrisman* v. *Miller*, 197

---

[1] The case originated in the Department as *United States* v. *Winegar*, 16 IBLA 112, 81 I.D. 370 (1974).

U.S. 313, 322 (1905); *Castle* v. *Womble*, 19 L.D. 455, 457 (1894). To be considered valuable, a mineral deposit must be capable of extraction, processing and marketing at a profit. *United States* v. *Coleman*, *supra* at 602; *Converse* v. *Udall*, 399 F.2d 616 (9th Cir. 1968), *cert. denied*, 393 U.S. 1025 (1969). Accordingly, a mineral deposit which yields only meager profits has been held to be not valuable within the meaning of the general mining law, on the ground that no prudent person would invest in actual operations in such circumstances. *See, e.g.*, *United States* v. *Edwards*, 9 IBLA 197, 203 (1973), *aff'd*, *Edwards* v. *Kleppe*, 588 F.2d 671 (9th Cir. 1978); *United States* v. *Harper*, 8 IBLA 357, 369 (1972).

The Department has always required that a mining claimant show, as a *present fact*, that there is a reasonable prospect of success in developing an operating mine that will yield a reasonable profit. The concept was first enunciated in *Castle* v. *Womble*, *supra*, and received full approbation in *Chrisman* v. *Miller*, *supra*. The rule has been consistently followed since. Ordinarily, speculation as to future changes in market conditions, technological improvements or inventions, or anticipated mineral prices will not demonstrate as a present fact that the commencement of actual mining operations would be justified. *Foster* v. *Seaton*, 271 F.2d 836, 838 (D.C. Cir. 1959); *United States* v. *Denison*, 76 I.D. 233, 239 (1969); *United States* v. *Jenkins*, 75 I.D. 312, 318 (1968). The proper test to be applied to pre-1920 oil shale claims, however, has been the subject of extension and recent litigation.

Interest in oil shale has always been tied to the belief that the mineral will at some future time become competitive with the liquid petroleum industry. Thus, in 1916, Geological Survey (Survey) classified certain lands as prospectively valuable for their oil shale content and so not subject to disposition under the agricultural land laws.

Based in part on Survey's land classification, the *Instructions* of May 10, 1920, 47 L.D. 548 (1920), issued directing the adjudication of oil shale patent applications in accordance with the requirements and limitations applicable to oil and gas placer claims and the requirements of the mining law.

In 1927 the case of *Freeman* v. *Summers*, 52 L.D. 201, enunciated the rule implied in the 1920 *Instructions*. That decision held that oil shale is a prospectively valuable mineral, and that claimants therein had discovered a valuable deposit. In addition, the case held that claimants, having found a lean outcropping of a mineral deposit in the Parachute Creek formation, could reliably infer the existence of the richer beds at depth.

Until 1960 *Freeman* v. *Summers* provided the rationale for the patenting of many hundreds of oil shale claims. In the case of *United States* v. *Winegar*, 16 IBLA 112, 81 I.D. 370 (1974), the Department had occasion to re-examine the hold-ng of *Freeman* v. *Summers*, *supra*. single issue was there presented: Vhether oil shale was a valuable nineral deposit as of Feb. 25, 1920, vhen the mineral was withdrawn from the operation of the general nining law by the Mineral Leasing ct, *supra*, and if so, whether such il shale has continued to be a valuble mineral deposit within the neaning of the general mining law. This Board concluded, after an exhaustive survey of the industry and relevant law, that *Freeman* v. *Summers* had been wrongly decided, and overruled it as contrary to the provisions of the general mining law.

Contestees obtained review in the United States District Court for the District of Colorado. *Shell Oil Co.* v. *Kleppe*, 426 F. Supp. 894 (D. Colo. 1977). The District Court held that the Board's overruling of *Freeman* v. *Summers* was volative of Congressional legislative authority, on the theory that hearings conducted by the Congress in 1930 and 1931 constituted approval of a "liberalized" rule of discovery in the case of oil shale placer mining claims. *Shell Oil Co.* v. *Kleppe*, *supra* at 901. The Court ruled that the Congress had taken a "special attitude toward oil shale lands" and ratified *Freeman* v. *Summers* as "an exception to the traditional discovery rule" because of "the unusual role of oil shale as a natural resource in contrast to other locatable minerals." *Id.* The Government appealed the District Court's ruling.

In *Shell Oil Co.* v. *Andrus*, 591 F.2d 597 (10th Cir. 1979), that Court affirmed the District Court and held that (syllabus statement) "the different treatment afforded all oil shale claims [in the period 1920 to 1960] as to the 'valuable mineral deposit' element of a location became part of the general mining laws by reason of its adoption and approval by both houses of Congress during the intensive investigations of this very question and their affirmative resolution of the issue," and therefore concluded that "the changes herein sought to be made by the Department as to 1920 standards incorporated in the mining laws were beyond executive authority." *Id.*

The 10th Circuit result was affirmed *sub nom. Andrus* v. *Shell Oil Co.*, —— U.S. ——, 64 L.Ed. 2d 593 (1980), 48 U.S.L.W. 4603 (June 2, 1980). The Supreme Court stated the issues before the Department in *Freeman* v. *Summers* as "(1) whether *a finding of lean surface deposits* warranted the geological inference that the claim contained rich 'valuable' deposits below; and (2) whether present profitability was a prerequisite to patentability" (64 L.Ed. 2d 593 (1980), 48 U.S.L.W. 4603, 4606 (1980)). (Italics supplied.) Both issues were decided in favor of the oil-shale claimant.

[1] We think it clear beyond peradventure that oil shale is now a prospectively valuable mineral with respect to which present marketability need not be shown under *Shell Oil*, *supra*.

[2] *Freeman* v. *Summers* states that the mining law requires that

> mineral be discovered within the limits of the claim located; that the mineral indications shall be such as to warrant a prudent man in the further expenditure of time and money, with a reasonable prospect of success. In order to warrant that proceeding, he must have *discovered mineral in such situation and such formation that he can follow the vein* or the *deposit to depth*, with a reasonable assurance that paying minerals will be found. In other words, *the discovery of an isolated bit of mineral, not connected with or leading to substantial prospective values, is not a sufficient discovery;* * * * [i]t is sufficient * * * if he finds mineral in a mass so located that he can follow the vein or the mineral-bearing body, with reasonable hope and assurance that he will ultimately develop a paying mine. [Italics supplied.]

52 L.D. at 204, 205.

As we read *Freeman* v. *Summers*, an exposure of the Parachute Creek member, even though of limited extent, can be geologically inferred to embrace sufficient quantity of high grade oil shale so as to constitute a valuable mineral deposit. We thus perceive one of the issues before this Board is whether contestees' claims contain an exposure of the Parachute Creek member that can be followed to depth with a reasonable assurance that paying minerals will be found.

[3] A single discovery of mineral sufficient for the location of a placer mining claim does not, however, conclusively establish the mineral character of all the land included in the location. Whether land embraced in a location is mineral in character is an issue which remains open to investigation and determination by the Department until patent issues. "The statute, mining regulations, and decisions clearly contemplate that a placer location may be made of a 10-acre tract in square form. If such a tract, whether in a location by itself or included with other such tracts in a maximum location, is proven to be nonplacer ground, such tract can not pass to entry and patent under the placer application." *American Smelting and Refining Co.*, 39 L.D. 299 at 301 (1910). *See also United States* v. *McCall*, 7 IBLA 21 (1972); *Crystal Marble Quarries Co.* v. *Dantice*, 41 L.D. 642 (1913).

The Government has moved to dismiss the charge of lack of discovery against portions, *infra*, of the Southwest and Northwest claims, and against the Oyler Nos. 1 through 4 claims (Opening Brief pp. 77–78, 130). The motion is granted, and accordingly, the remainder of the discussion concerns only parts of the Southwest and Northwest claims, the Southeast and Northeast claims in their entirety, and the Carbon and Elizabeth claims.

THE COMPASS GROUP

These claims are physically located on the east face of a precipitous ridge called Cow Ridge.[2]

---

[2] The Compass claims are situate in W½E½NE¼, W½NE¼, N½NW¼, SW¼NW¼, NW¼SW¼, S½SW¼, SE¼, sec. 27, T. 7 S., R. 98 W., sixth principal meridian.

The claims are entirely underlain by the Green River formation, and contain the Uinta formation, the Parachute Creek and Lower Shaly[3] members (B-D 101(a), p. 4).

As previously noted, contestees in No. 658 applied for mineral patent in 1959. In connection therewith, Ralph Spengler, Warren Sholes, and James F. McIntosh, valuation engineers employed by the Bureau of Land Management (BLM), prepared a mineral report dated Jan. 26, 1960 (B-D 101(a)). On Nov. 10, 1959, contestees' representative obtained two samples from the claims. On Nov. 11, 1959, claimant John Savage obtained a third sample, and he and Spengler also obtained a fourth. All samples were taken from weathered outcrops, resulting in lower assays than would be the case if unexposed rock in place had been sampled.

On Feb. 25, 1963, Spengler submitted a supplemental mineral report (B-D 101(b)), in which additional sampling by Spengler and McIntosh on Aug. 21 and 22, 1962, was discussed. The supplemental report notes that the additional sampling was conducted to demonstrate that the Lower Shaly member contains "abundant barren sandstone and siltstone and only a few oil bearing marlstones" (B-D 101 (b), p. 8). It was observed that high grade oil shale should outcrop more prominently than the sandstone because of its greater resistance to weathering. The Compass claims contain no such outcroppings. Spengler concluded that the group contains "the lowest grade and thinnest [*sic*] bedded oil shale and the smallest total amount of potentially valuable oil shale of any deposit previously examined," particularly in the cases of the Southeast and the Northeast claims. *Id.* at 9.

In a second supplemental mineral report dated Mar. 16, 1977 (B-D 101(c)), Spengler identified those portions of the claims he found nonmineral in character: The Southeast and Northeast claims in their entirety; the SW¼SE¼SW¼ and the SW¼SW¼ of the Southwest claim; and the NE¼NW¼ and the E½NW¼NW¼ of the Northwest claim, all in sec. 27, T. 7 S., R. 98 W., sixth principal meridian.

Spengler adverted to an interview with Ronald C. Johnson, who, in 1975, preliminarily mapped the area.[4] The report states that Johnson was of the opinion that "there are no oil shale beds below 'B' groove (the transitional zone immediately below the Mahogany zone) in the [vicinity of the Compass claims] other than one thin (less than one foot) bed." *Id.* at pp. 3-4.

He concluded, based upon the information available to him, that "there are only a few scattered low grade beds of oil shale below 'B' groove and that the beds are low grade and not feasible for exploitation using current mining heights and cutoff grades." Therefore, regarding only the beds above "B" groove as valuable beds, Spengler stated that erosion had removed such valuable beds from the Northeast and Southeast claims entirely, and that a total of 61 percent and 68 percent of those beds had been eroded from the Southwest and Northwest claims, respectively, B–D 101(C), Table 1.

---

[3] This informal nomenclature refers to the lower third of the Parachute Creek member.

[4] Geological Survey Map MF-688, "Preliminary Geologic Map, Oil Shale Yield Histograms and Stratigraphic Sections, Long Point Quadrangle, Garfield County, Colorado."

THE CARBON AND ELIZABETH CLAIMS

These claims are situated in secs. 32 through 36, T. 4 S., R. 97 W., sixth principal meridian.[5] Neither the Douglas Creek nor the Garden Gulch members, or their lateral equivalent, the Anvil Point member, is exposed upon the claims. The Parachute Creek member does not outcrop on these claims, though it is exposed less than 2 miles away from the Carbon No. 4 and the Elizabeth No. 1 (B–D 210, p. 23). The Mahogany marker is some 490 to 900 feet below the surface of the claims. *Id.* at p. 22. The principal exposure is of the Uinta formation, with interfingering of the Bull Fork, Barnes Ridge, Stewart Gulch, and Coughs Creek marlstone tongues, which are not generally well exposed. *Id.* at pp. 23–24.

Several holes were drilled on the claims. Of these, only two penetrated the Parachute member. The Carbon hole, located on the Carbon No. 4 claim, intersected the Mahogany marker at 435 feet below the surface. The Elizabeth 1 hole, located on the Elizabeth No. 4 claim, intersected the Mahogany marker at 724 feet. Neither corehole is positioned so that contestees might claim a discovery benefitting any adjoining claims, except inferentially (B–D 105, B–D 203, B–D 204). These coreholes, however, were drilled after Feb. 25, 1920.

Under the principles earlier discussed, we conclude that the charge of lack of discovery must be sustained against some of the Compass claims, and against the Carbon and Elizabeth claims in their entirety.

The Northeast and Southeast claims are null and void for lack of a sufficient discovery under *Freeman* v. *Summers*. There are no exposed values within the claim which appear to connect with or lead to substantial prospective values. The valuable oil shale member has been completely eroded away.

The remaining claims have been examined in 10-acre tracts. *See* Table 1, B–D 101(C). We hold that the following tracts of the Southwest claim must be excluded from contestees' pending application for patent, as nonmineral in character:

T. 7 S., R. 98 W., sixth principal meridian
Sec. 27
SW¼SW¼
SW¼SE¼SW¼.

In the instance of the Northwest claim, the following 10-acre tracts are held to be nonmineral in character and are accordingly excluded from the patent application:

---

[5] The Carbon and Elizabeth claims are situate in N½N½ sec. 32 and in secs. 33 through 36, T. 4 S., R. 97 W., sixth principal meridian, their entirety. Portions of the surface and mineral estates have been patented and are not here involved.

T. 7 S., R. 98 W., sixth principal meridian
Sec. 27
NE¼NW¼
E½NW¼NW¼.

The remaining portions of the Northwest and the Southwest claims are held to be supported by a discovery of valuable mineral deposit, and the charge of lack of discovery in the contest complaint is dismissed as to them. Those tracts are as follows:

T. 7 S., R. 98 W., sixth principal meridian
Sec. 27
SW¼NW¼
NW¼SW¼
W½NW¼NW¼
N½SE¼SW¼
SE¼SE¼SW¼.

[4] None of the Carbon and Elizabeth claims contain disclosures of mineral. The corehole findings avail contestees nothing as they were drilled after Feb. 25, 1920. As we read *Freeman* v. *Summers* an exposure of the Parachute Creek member, even though of limited extent, can be geologically inferred to embrace sufficient quantity of high grade oil shale so as to constitute a valuable mineral deposit. Nevertheless, the physical exposure of that member is the *sine qua non* of a discovery, and absent a discovery in existence on Feb. 25, 1920, the claims were not excepted from the provisions of the Mineral Leasing Act. The Carbon and Elizabeth claims are therefore declared null and void on the ground that they contained no *exposure* of a valuable mineral deposit upon which claimants could rely to geologically infer the existence of richer beds at depth as of Feb. 25, 1920.

The existence of qualifying discoveries on each of the Oyler claims is conceded by the Government and we hold the complaint regarding these claims dismissed as to the discovery charge.

We adhere, however, to our decision in *United States* v. *Bohme*, *supra*, in which the Compass claims were held valid, and the Carbon and Elizabeth, and Oyler claims declared null and void on the sole ground of failure to comply with the provisions of 30 U.S.C. § 28 (1976), governing annual assessment work. All else being regular, therefore, those portions of the Northwest and Southwest claims as hereinbefore described, *supra*, shall immediately proceed to patent, all else being regular.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, in Contest No. 658, the portions named above of the Northwest and Southwest claims held supported by a discovery, shall proceed to patent, all else being regular. The Northeast and Southeast and remaining portions of the Northwest and Southwest claims in Contest No. 658 are null and void for lack of a discovery. In Contest No. 659, the Carbon and Elizabeth claims are held null and void on the grounds of lack of a discovery and failure to substantially comply with the assessment work provisions of the mining law. In Contest No. 660 the withdrawal of the charge relating to lack of discovery is accepted, but the Oyler claims are declared null and void on the ground of failure to substantially comply with the assessment work provisions.

Douglas E. Henriques
Administrative Judge

We concur:

Edward W. Steubing
Administrative Judge

James L. Burski
Administrative Judge

GULF OF MEXICO EXEMPTION FROM SEC. 25 OF THE OUTER CONTINENTAL SHELF LANDS ACT, AS AMENDED

M-36923

November 5, 1980

1. Outer Continental Shelf Lands Act: Oil and Gas Leases

The Secretary's mandate under the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 *et seq.* (Supp. II 1978), to administer and supervise development and production of the oil and gas resources of the OCS could not be accomplished without the authority to require development and production plans from oil and gas lessees in the Gulf of Mexico.

2. Outer Continental Shelf Lands Act: Oil and Gas Leases

Sec. 25 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1351 (Supp. II 1978), does not deprive the Secretary of authority to require development and production plans for oil and gas leases in the Gulf of Mexico.

3. Outer Continental Shelf Lands Act: Oil and Gas Leases

Secs. 25(a)(1) and 25(b) of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1351 (a)(1) and (b) (Supp. II 1978), exempt oil and gas lessees in the Gulf of Mexico and OCS lessees who have discovered oil or gas in paying quantities at the time of enactment of these sections from submitting development and production plans which meet the requirements of sec. 25 of the Act.

4. Outer Continental Shelf Lands Act: Oil and Gas Leases

The Secretary need not apply the criteria of sec. 25(c) of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1351(c) (Supp. II 1978), which describe the contents of a development and production plan, to lessees in the western Gulf of Mexico if the full range of information required by sec. 25(c) is not necessary for effective administration of the exempted leases.

5. Outer Continental Shelf Lands Act: Oil and Gas Leases

The submission of environment reports is not necessary for oil and gas lessees in the Gulf of Mexico except where the environmental information in the report is necessary for a state with an approved coastal zone management plan to make a consistency determination or is necessary for the Secretary to carry out his statutory responsibilities.

6. Outer Continental Shelf Lands Act: Oil and Gas Leases

No environmental impact statements need be prepared prior to the approval of development and production plans for oil and gas leases in the western Gulf of Mexico.

7. Outer Continental Shelf Lands Act: Oil and Gas Leases

The Secretary is not required to follow the approval time frames set out in sec. 25(g) and (h) of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1351(g) and (h) (Supp. II 1978), when considering development and production plans submitted by oil and gas lessees in the western Gulf of Mexico.

8. Outer Continental Shelf Lands Act: Oil and Gas Leases

Oil and gas leases in the western Gulf of Mexico are not exempt from the requirement in sec. 19 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1345 (Supp. II 1978), which provides that the Governor of any affected state and the executive of any affected local government in such state shall have a 60-day period, prior to the approval of a development and production plan for a lessee to submit recommendations to the Secretary.

9. Outer Continental Shelf Lands Act: Oil and Gas Leases

Oil and gas lessees in the western Gulf of Mexico are not exempt from sec. 5(a)(8) of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1334(a)(8) (Supp. II 1978), requiring that lessees comply with air quality standards to the extent that authorized activities significantly affect the air quality of any state.

10. Outer Continental Shelf Lands Act: Oil and Gas Leases

Western Gulf of Mexico lessees conducting activities for which a Federal license or permit is required and which affect any land use or water use in the coastal zone of a state with an approved state coastal zone management program are not exempt from the federal consistency requirements of secs. 25(d) and 25(h) of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1351(d) and (h) (Supp. II 1978).

To: Secretary
From: Solicitor
Subject: Gulf of Mexico Exemption from Sec. 25 of the Outer Continental Shelf (OCS) Lands Act, as amended

Prior to the publication of the proposed OCS Exploration and Development Plan Regulations (44 FR 3513 (Jan. 17, 1979)), you asked our opinion to to whether the language of sec. 25 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1351 (Supp. II 1978) (all cites hereinafter to Supp. II 1978), precludes the Department from continuing to require the submission of development and production plans in all areas of the Gulf of Mexico. We indicated that the exemption language of sec. 25 could be reasonably interpreted to mean that plans for all areas of the Gulf of Mexico could still be required by the Secretary as they were prior to enactment of the 1978 amendments, but that the new procedural requirements, content criteria, and other new provisions contained in sec. 25 of those amendments were not intended by Congress to be applicable to Gulf of Mexico lessees. Consistent with that interpretation, the regulations were drafted and promulgated to require development and production plans for all areas including the Gulf of Mexico but to exempt lessees in the Gulf (except off the coast of Florida) from the requirement that environmental reports be submitted with their development and production plans. See 30 CFR. 250.34–2, 44 FR 53686 (Sept. 14, 1979).

In light of a petition for revision of this provision by the American Petroleum Institute, you have now asked us to reexamine this issue and determine whether we remain convinced that the Department has the authority to continue to require submission of development and production plans for oil and gas leases in the Gulf of Mexico.

CONCLUSION

Based on the Department's mandate to administer and supervise development and production of the oil and gas resources of the OCS, the statutory language of sec. 5 and sec. 25 of the OCS Lands Act, language in the Conference Committee report, and discussions which occurred during the Conference Committee meetings, we have concluded that our initial view was correct. The Department has the authority to continue to require development and production plans from all lessees in the Gulf, but the procedures and content criteria established in the 1978 amendments do not apply to these operations except in the eastern Gulf off Florida. The reasons for our conclusion are described below.

A. THE DEPARTMENT'S MANDATE TO SUPERVISE OCS OPERATIONS

Under sec. 5 of the OCS Lands Act, the Secretary of the Interior is responsible for the management, development, and protection of the oil and gas resources of the entire OCS. 43 U.S.C. § 1334. A multitude of functions is necessary to fulfill this mandate, including, but not limited to, the following:

1. The Secretary must insure that lessees exploring, developing and producing OCS leases issued after Sept. 18, 1978, use the best available and safest technologies. 43 U.S.C. § 1347(b). *See* 43 U.S.C. §§ 1332(b), 1801(6) and 1802(3).

2. He has authority to prevent waste and to insure the conservation of the natural resources of the OCS. 43 U.S.C. § 1334(a).

3. He must insure the prompt and efficient exploration, development and production of the oil and gas resources of the OCS. 43 U.S.C. §§ 1334(a)(7) and 1337(b)(4). *See* 43 U.S.C. §§ 1802 (1) and (2).

4. In conjunction with other Federal agencies he must enforce all health, safety, and environmental laws and regulations on the OCS. 43 U.S.C. § 1334(a).

5. In conjunction with the Department of Energy, he must insure that OCS lessees produce oil and gas at appropriate rates. 43 U.S.C. § 1334(g).

6. He must consider the recommendations of the Governors of affected states and other local officials regarding proposed lease sales and proposed development and production plans. 43 U.S.C. § 1345. *See* 43 U.S.C. §§ 1332(4), 1802(5) and (6).

7. He has the authority to grant suspensions of operations or suspensions of production when necessary

to facilitate proper development of leases or to allow the construction or negotiation of use of transportation facilities and to order such suspensions for environmental reasons. 43 U.S.C. §§ 1334(a)(1) and 1337(b)(5).

8. He may authorize or require unitization of leases. 43 U.S.C. § 1334(a)(4).

9. He must insure compliance with air quality standards. 43 U.S.C. § 1334(a)(8).

It is impossible to carry out these functions unless the Secretary has the authority to require information from lessees relating to their development and production activities and has the ability to disapprove such activities if they are not consistent with the OCS Lands Act and implementing regulations. The development and production plan is an appropriate way to obtain such information. Furthermore, the ability to approve or disapprove such a plan gives the Secretary the necessary control over development and production activities.

A development and production plan may contain information to assure the Secretary that the best available and safest technologies are being used, that development and production rates are adequate, that the environment is being adequately protected, and that the oil and gas reserves and other natural resources of the OCS are being conserved. Likewise, without the information typically set forth in development and production plans, such as the time schedules, he would not know whether suspensions of operations requested by lessees should be granted.

The Secretary has thus found development and production plans to be essential tools. Without them he could not properly supervise and manage OCS activities in the Gulf of Mexico, where over 95% of this country's current OCS development and production occurs. We do not believe that Congress, by creating the Gulf of Mexico exemption in sec. 25, intended at best to handicap and at worst to prevent the Secretary from carrying out his supervisory responsibilities over these OCS activities.

We have examined the existing regulations and find that the information they require to be included in development and production plans for leases in the Gulf of Mexico is consistent with the Secretary's duty to supervise properly OCS activities in that region. The regulations provide, for example, that environmental reports are only required for these leases when development and production activities would affect a land or water use in the coastal zone of a State with an approved coastal zone management program. See 30 CFR 250.34-1(a)(2)(ii) and 250.34-2(a)(3)(i). In addition, the regulations specifically allow the Director of the Geological Survey, after consultation with the Office of Coastal Zone Management and the affected State, to limit the information in such environmental reports to that necessary for a State to make a coastal zone consistency determination. See 30 CFR 250.34-3 (a)(1)(iii) and 250.34-3(b)(1)(iv). Furthermore, in the interest of reducing the burden on Gulf of Mexico lessees, the regulations also allow the Director to limit the amount of information in these development and production plans to only that necessary to assure compliance with applicable law and established lease terms. See 30 CFR 250.34-2(a)(2). The foregoing clearly demonstrate the practice of the Secretary to impose reporting requirements on Gulf of Mexico lessees only to the extent necessary to carry out his statutory duties.

B. THE STATUTORY LANGUAGE

The specific language of sec. 25 (a)(1) indicates that Congress did not intend to deprive the Secretary of authority to require development and production plans for Gulf of Mexico leases. That section provides:

> Prior to development and production pursuant to an oil and gas lease issued after the date of enactment of this section in any area of the outer Continental Shelf, other than the Gulf of Mexico, or issued or maintained prior to such date of enactment in any area of the outer Continental Shelf, other than the Gulf of Mexico, with respect to which no oil or gas has been discovered in paying quantities prior to such date of enactment, the lessee shall submit a development and production plan (hereinafter in this section referred to as a "plan") to the Secretary, *for approval pursuant to this section.* [43 U.S.C. § 1351(a)(1) (Italics added).]

The language does not suggest that lessees in the Gulf of Mexico and lessees with leases issued prior to enactment of the regulations are totally exempt from any requirement to submit a plan. Instead it states that these lessees are not required to submit a plan "*for approval pursuant to this section.*" The fact that Congress added the phrase "for approval pursuant to this section" indicates that the exemption was created to insure that the development and production plans submitted by these lessees were not subject to the statutory procedures, approval time frames, environmental requirements and content criteria the Congress was requiring for other, non-exempt plans.

This interpretation is reinforced by the language of sec. 25(b) which again makes it clear that Gulf of Mexico lessees, as well as other lessees with leases issued before enactment of the amendments, are exempt from the imposition of the *new* requirements of sec. 25. That section provides:

> After the date of enactment of this section, no oil and gas lease may be issued pursuant to this Act in any region of the outer Continental Shelf, other than the Gulf of Mexico, unless such lease requires that development and production activities be carried out in accordance with a plan *which complies with the requirements of this section.* [43 U.S.C. § 1351(b) (Italics added).]

Again, as in sec. 25(a), the exemptions created excuse lessees in the Gulf of Mexico and lessees with leases existing at the time of enactment of the amendments from submitting plans *which comply with* *the requirements of this new section.* It does not, however, excuse them from submitting any plan whatsoever.

Sec. 25(e)(1) buttresses this interpretation. It provides:

> At least once the Secretary shall declare the approval of a development and production plan in any area or region (as defined by the Secretary (of the outer Continental Shelf, *other than the Gulf of Mexico*, to be a major Federal action. [43 U.S.C. § 1351(e)(1) (Italics added).]

If Congress had intended that no development and production plans be submitted for the Gulf, there would have been no reason to add the exception "other than the Gulf of Mexico" to this provision. This provision requires that in any area of the OCS except the Gulf of Mexico, at least one EIS must be done prior to approval of a development and production plan, but that in the Gulf, an EIS will not be necessary prior to the approval of a development and production plan. Had Congress intended that no plans be submitted by lessees in the Gulf, this provision exempting the approval of plans in the Gulf of Mexico from NEPA requirements would have been superfluous.

The final provision of sec. 25 which addresses the Gulf of Mexico exemption is sec. 25(*l*) which provides:

> The Secretary may require *the provisions of this section* to apply to an oil and gas lease issued or maintained under this Act, which is located in that area of the Gulf of Mexico which is adjacent to the State of Florida, as determined pursuant to section 4(a)(2) of this Act. [43 U.S.C. § 1351(l) (Italics added).]

The underlined phrase is important here. Consistent with the other applicable language in sec. 25, Congress indicated by these words that the exemption went to the development and production plan requirements of the amendments, and not to the submission of a development and production plan. Had Congress intended the latter, it would have simply provided that the Secretary may require the submission of development and production plans for areas of the Gulf of Mexico adjacent to Florida.

Thus the pattern of exempting Gulf of Mexico lessees from the new requirements imposed by the amendments, but not from the submission of development and production plans, recurs consistently throughout sec. 25. It is our opinion that this statutory language contradicts the theory that sec. 25 strips the Secretary of authority to require that western Gulf of Mexico lessees submit development and production plans.[1]

The position of the American Petroleum Institute ignores the genesis of the requirement for development and production plans which was sec. 5 of the Outer Continental Shelf Lands Act of 1953. Sec. 5 was used as the authority as far back as 1954 to require plans similar in character to those now called development and production plans. *See* 19 FR 2657 (May 8, 1954). Sec. 5 read, in part, as follows:

---

[1] The term "western Gulf of Mexico" is used herein to describe all OCS areas of the Gulf of Mexico except those in the eastern Gulf off the coast of Florida.

> The Secretary shall administer the provisions of this subchapter relating to the leasing of the outer Continental Shelf, and shall prescribe such rules and regulations as may be necessary to carry out such provisions. The Secretary may at any time prescribe and amend such rules and regulations as he determines to be necessary and proper in order to provide for the prevention of waste and conservation of the natural resources of the outer Continental Shelf, and the protection of correlative rights therein, and notwithstanding any other provisions herein, such rules and regulations shall [as of their effective date] apply to all operations conducted under a lease issued or maintained under the provisions of this subchapter. [67 Stat. 464; 43 U.S.C. § 1334(a)(1)(1976).]

Although sec. 5 was amended in certain respects in 1978, the foregoing language remains unchanged (*see* 43 U.S.C. § 1334(a)) and in our view still constitutes authority to require such plans.

The American Petroleum Institute appears to believe that sec. 25 embodies the exclusive provision concerning the requirement for development and production plans and that sec. 25 therefore supersedes sec. 5 in this respect. It thus relies on the doctrine of repeal by implication. The Supreme Court, however, has consistently applied the rule that repeals by implication are not favored; that the intention of the legislation to repeal must be clear and manifest; that every attempt must be made to reconcile the statute involved; and that a repeal by implication will be found only where there is a "positive repugnancy" between the statutes in question. *Morton* v. *Mancari*, 417 U.S. 535, 549–551 (1974); *United States* v. *Borden Co.*, 308 U.S. 188, 198–199 (1939).

In our view, the relationship between sec. 5 and sec. 25 does not meet these rigorous standards. The two sections can readily coexist as described above and there is no "positive repugnancy." Implied repeal is particularly abhorrent here where Congress had an opportunity to amend sec. 5 to reflect the exclusivity of sec. 25 and chose not to do so.

In practical terms, we believe that the exemption means that:

1. It is not necessary for the Secretary to apply the criteria of sec. 25(c), which describe the contents of a development and production plan, to lessees in the western Gulf of Mexico if the full range of information required by sec. 25(c) is not necessary for effective administration of the exempted leases;

2. The submission of environmental reports will not be necessary for lessees falling within the exemption except where the environmental information in the report is necessary for a state with an approved coastal zone management plan to make a consistency determination or is necessary for the Secretary to carry out his statutory responsibilities;

3. No EIS's need be prepared prior to the approval of development and production plans in the western Gulf of Mexico; and

4. The Secretary is not required to follow the approval time frames set out in secs. 25(g) and (h) when considering development and production plans submitted by western Gulf of Mexico lessees.

There are certain requirements in the amendments, however, from which western Gulf of Mexico lessees are not exempt. Sec. 19 provides that "[A]ny Governor of any affected State and the executive of any affected local government in such State" shall have a 60-day period, prior to the approval of a development and production plan, to submit recommendations to the Secretary. 43 U.S.C. § 1345. This provision contains no exceptions or exemptions and thus the 60-day comment period must be made available to the Governors of Louisiana, Texas, Mississippi and Alabama. The air quality regulations which the Department has promulgated also apply to western Gulf of Mexico lessees since sec. 5(a)(8) requires that lessees must comply with air quality standards to the extent that activities authorized under the act significantly affect the air quality of *any* state. 43 U.S.C. § 1334(a)(8). Finally, western Gulf of Mexico lessees conducting activities for which a federal license or permit is required and which affect any land use or water use in the coastal zone of a state with an approved state coastal zone management program are not exempt from the federal consistency requirements of secs. 25(h) and 25(d). Sec. 608(a) of the OCS Lands Act Amendments provides:

> ***Except as otherwise expressly provided in this Act,*** nothing in this Act shall be construed to amend, modify, or repeal any provision of the Coastal Zone Management Act of 1972, the National Environmental Policy Act of 1969, the Mining and Mineral Policy Act of 1970, or any other Act. [43 U.S.C. § 1866(a) (Italics added).]

Neither sec. 25(d) nor 25(h) contains an explicit exemption for Gulf of Mexico lessees and thus they are subject to the consistency requirement.

C. THE LEGISLATIVE HISTORY

The legislative history on this subject is, in places, confusing. Some of the statements in the early history of the amendments suggest that at least some members of Congress understood the language of sec. 25 to create an exemption from any requirement that development and production plans for leases in the Gulf of Mexico be submitted to the Department. However, a discussion which occurred on June 28, 1978, during one of the Conference Committee meetings on the amendments, indicates that the conferees and authors of the legislation understood the limited nature of the exemption. The Conference Committee was discussing sec. 25(l) which was included in the House version of the bill. That section provided:

> An oil and gas lease issued or maintained under this Act which is located in any

area which is not a frontier area shall be subject to the provisions of this section if the Secretary determines, pursuant to regulations prescribed by the Secretary that the likely environmental or onshore impacts of the development and production of such lease make the application of the provisions of this section in the public interest.

Senator Johnston began the discussion:

Mr. Chairman, I have a question here about whether in the Western Gulf, whether [*sic*] there is production at the present time whether the *requirements for environmental impact statements* between exploration and production would apply, and whether the *transmittal of information to the states would apply.* The predicate for my question is, my understanding is under regulations issued in January that the Secretary is treating the existing area of production in the Gulf to incorporate this requirement of environmental impact statement between exploration and production.

Frankly, I had an amendment drawn to exclude that area from that requirement.

I would like to ask counsel if, under this language, that is required?

Mr. Belsky: *Under this language in the Gulf of Mexico, whatever existing regulations require is not affected. Existing regulations in operation since December 1975 introduced by then Secretary Kleppe provide for development and production plans and onshore impact statement* (*sic*) *to be submitted to affected states.* That was done.

The recent provisions introduced expanded what information has to go to the states, but did not change the basic provision that was included originally in December 1975. This provision, without L—without L—would mean that existing law, the submission of D&P plans were to change—the provision of this section requiring EIS, requiring certain types of information to be supplied, and certain procedures for review would not apply. It would only apply to areas that are "frontier, excluding Gulf of Mexico."

Senator Johnston: Would this language put an imprimatur of this bill on the existing regulations?

Mr. Belsky: No, sir, not one way or another. It does not affect, as we discussed in the exploration area, *it does not say one way or another where we approve or disapprove of existing regulations.* We believe for these areas that are meant to be covered, the regulations should be as provided for in this section.

Senator Johnston: Mr. Chairman, there is a problem here we have been discussing for the last 30 minutes or so about when those regulations were promulgated, what they require.

It seems to me that in the area of the existing Gulf, our existing production, where we have been producing for over 33 years, that these requirements for additional environmental impact statements are unwise.

Now, Mr. Belsky advises that since this is in both bills that we would not have the power to extricate that requirement from these bills. I would suggest, therefore, in lieu of an amendment to have report language which would make it clear than we are not putting any imprimatur or any approval on these regulations, and that we should have language to the effect that in areas of existing production in the Gulf that the Secretary should minimize the delay and red tape requirements on both exploring for and producing oil and gas.

I do not know whether that will achieve fully what I want to achieve, but at least it will be some statement.

Senator Jackson: I would hope, Mr. Chairman, that could be agreed to. I think that is reasonable.

The Chairman: Is there objection?

Senator Jackson: That would be the language in the statement as part of the managers.

Senator Johnston: And L is dropped. (From Conference Committee Transcripts of June 28, 1978) (Italics added).

Mr. Belsky's explanation of the language of sec. 25 regarding the Gulf of Mexico exemption demonstrates the intent of the exemption language: the existing requirement that a development and production plan be submitted in the Gulf would not be affected; however, the new sections of the amendments "requiring EIS, requiring certain types of information to be supplied, and certain procedures for review would not apply." Clearly the Congressional concern was with onerous and unnecessary environmental reporting requirements and time-consuming review of the plans by state and local governments and not over the basic plan submission requirement.

The Joint Explanatory Statement of the Conference Committee confirms this intent. It states:

> Both versions contain detailed and similar provisions describing development and production plans. The House amendment requires a development and production plan to be submitted for all future leases in a frontier area. The Senate bill provides for a development and production plan to be submitted for all future leases anywhere. The conference report requires a plan to be submitted for all future leases except in the Gulf of Mexico.
>
> The House amendment also requires a plan to be submitted for existing leases in frontier areas, where no oil or gas has been yet discovered. The Senate bill similarly requires a plan to be submitted for existing leases where there has not yet been a discovery, but exempts the Gulf of Mexico. The conference report adopts the Senate language. Thus the mandate and specific procedures of this bill that the Secretary of Interior must secure submission, and then review, approve, or disapprove a development and production plan applies to new leases or existing leases where there has been a discovery and does not apply to leases, old or new, in the Gulf of Mexico. *This does not affect the existing requirements on lessees, already established by the Secretary of Interior.*
>
> The conferees, by recommending the enactment of section 25 to the Congress, are not approving or disapproving existing requirements for development and production. *It is hoped that the Secretary of Interior will apply existing law and requirements to tracts which have commenced development and production, and to other areas in the Gulf of Mexico, where development and production activities have been going on for a number of years,* in such a manner as to limit bureaucratic redtape and otherwise minimize delays in the search for and production of oil and gas.
>
> The requirements of this new section are specifically made inapplicable to the Gulf of Mexico. However, there are areas in the eastern gulf that have never been developed. While a sale—the so-called MAFLA sale—has been held for this region, no development or production has occurred there. The conferees therefore adopt a provision that gives the Secretary of the Interior the discretion to require submission of plan *in accordance with this section*—for development and production activity in this area which is defined as being adjacent to the State of Florida. [H. Rep. No. 1091, 95th Cong., 2d Sess. 115–116 (1978) (italics added).]

This final conference statement demonstrates that the existing requirement that development and production plans be submitted in the Gulf was not eliminated, but that the new and more burdensome procedures and requirements incorporated into the development and production plan process were not regarded as applicable to lessees in the western Gulf of Mexico. Thus the most authoritative legislative history supports the natural interpretation of the language of the Act itself.

SUMMARY AND CONCLUSION

The Department has the authority to require development and production plans from all lessees in the Gulf, but the procedures and content criteria established in the 1978 amendments do not apply to these operations except in the eastern Gulf off the Florida coast. Our opinion is based upon:

1. The general purpose of the statute, which is to give the Secretary of the Interior the authority to supervise and manage development and production of the oil and gas resources of the OCS;
2. The statutory language of secs. 5 and 25 of the OCS Lands Act; and
3. The legislative history of the 1978 amendments, and in particular the language in the Joint Explanatory Statement of the Conference Committee, which explicitly states that the Department should apply existing requirements to Gulf of Mexico tracts.

One final point should be made. The Department has recently published proposed regulations which provide a "plan of operations" to be submitted in lieu of a development and production plan for leases in the western Gulf of Mexico. 45 F.R. 52408 (Aug. 7, 1980). Under the regulations, a plan of operations would be required for a lease in the western Gulf of Mexico. Although similar to a development and production plan, it need not contain the new requirements of sec. 25 of the OCS Lands Act. In this regard, the regulations are consistent with and supported by this opinion. It is important to recognize that the regulations call for a plan of operations to be submitted "in lieu" of a development and production plan, so that requirements such as the time for recommendations under sec. 19 would be triggered by the receipt of a proposed plan of operations which would replace the development and production plan for such leases.

CLYDE MARTZ
Solicitor

WOLVERINE COAL CORP.

2 IBSMA 325

Decided *November 7, 1980*

Appeal by the Office of Surface Mining Reclamation and Enforcement (OSM) from a June 6, 1980, decision of Administrative Law Judge Tom M. Allen in Docket No. NX 0–121–R, vacating Notice of Violation No. 80–2–18–6 on the grounds that OSM lacked jurisdiction over Wolverine Coal Corporation's tipple operation.

Reversed.

1. Surface Mining Control and Reclamation Act of 1977: Tipples and Processing Plants: In Connection

With—Surface Mining Control and Reclamation Act of 1977: Words and Phrases

"Surface coal mining operations." When a tipple is owned and operated by the same company that owns and operates the two mines supplying most of the coal processed through the tipple, that tipple is operated "in connection with" a surface coal mine within the meaning of "surface coal mining operations" in 30 CFR 700.5.

2. Surface Mining Control and Reclamation Act of 1977: Tipples and Processing Plants: At or Near a Minesite—Surface Mining Control and Reclamation Act of 1977: Words and Phrases

"Surface coal mining operations." When a tipple is operated in connection with two surface coal mines and is located 7 and 13 miles from those mines, that tipple is held to be "near" the minesite within the meaning of "surface coal mining operations" in 30 CFR 700.5.

APPEARANCES: Courtney W. Shea, Esq., Office of the Field Solicitor, Knoxville, Tennessee, James M. McElfish, Esq., and Mark Squillace, Esq., Office of the Solicitor, Division of Surface Mining, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

The Office of Surface Mining Reclamation and Enforcement (OSM) has appealed a June 6, 1980, decision of Administrative Law Judge Tom M. Allen, vacating Notice of Violation No. 80-2-18-6 on the grounds that OSM lacked jurisdiction over Wolverine Coal Corporation's (Wolverine) tipple operation. For the reasons set forth below, we reverse that decision.

Background

On Jan. 29, 1980, OSM inspected Wolverine's Hickory Tipple, permit No. 277-8000, on Brushy Fork of Gun Creek in Magoffin County, Kentucky, pursuant to the Surface Mining Control and Reclamation Act of 1977.[1] The permit area, which was in excess of 2 acres, lacked a sedimentation pond (Tr. 4, 8, 9, 12, 14). Accordingly, OSM issued Notice of Violation No. 80-2-18-6 for a violation of 30 CFR 715.17(a).[2]

Wolverine sought review of this notice and, on Apr. 3, 1980, a hearing was held. In his written decision of June 6, 1980, the Administrative Law Judge held that OSM has no jurisdiction over the tipple in question. OSM filed a timely appeal and a brief. Wolverine did not file a brief.

Discussion and Conclusion

In *Drummond Coal Co.*, 2 IBSMA 96, 87 I.D. 196 (1980) (*Drummond I*), the Board stated a two-part test for determining whether a coal processing or loading facility is a surface coal mining operation within the meaning of 30 CFR 700.5. That test asks first whether the facility is operated "in connection with" a mine, and secondly, whether it is "at or near the minesite." We find that this test is met in this case.

---

[1] Act of Aug. 3, 1977, 91 Stat. 445, 30 U.S.C. §§ 1201–1328 (Supp. II 1978).

[2] 30 CFR 715.17(a) requires that "[a]ll surface drainage from the disturbed area, * * * shall be passed through a sedimentation pond or a series of sedimentation ponds before leaving the permit area."

[1] The Hickory Tipple is operrated in connection with two Wolverine mines. Wolverine owned, operated, and held the permit on the Hickory Tipple (Tr. 14). Wolverine also owned and operated one strip and one auger mine that together supplied 69 percent of the coal loaded through the facility (Applicant's Exh. 2; Tr. 25). In *Drummond Coal Co.*, 2 IBSMA 189, 87 I.D. 347 (1980) (*Drummond* II), we held that a processing facility is operated in connection with a surface coal mine within the meaning of 30 CFR 700.5 when the facility is owned and operated by the same company that owns and operates the mine or mines supplying most of the coal to that facility. There are no essential differences between the facts here and those in *Drummond II*. Therefore, we hold that the Hickory Tipple was operated in connection with the two Wolverine mines within the meaning of 30 CFR 700.5.[3]

[2] The Hickory Tipple is also near the two Wolverine mines. A the Board has noted, "near" is a relative term, depending for its interpretation on the circumstances of each case. In previous cases in which the Board considered processing facilities owned and operated in common with the mines supplying their coal, the Board has held that distances of 9 to 30 miles (*Drummond I*) and 7 to 15 miles (*Drummond II*) were at or near the minesite. The evidence in this case shows that the two Wolverine mines were 7 and 13 miles from the tipple (Applicant's Exh. 1). There is the same type of functional integration and common ownership in this case as in the two *Drummond* cases; thus, we hold that the Hickory Tipple was "near" those mines within the meaning of 30 CFR 700.5.

Because the Hickory Tipple is operated in connection with the two Wolverine mines and is near those mines, it is subject to regulation by OSM. The decision below is, therefore, reversed. Wolverine stipulated at the hearing that there were no sedimentation ponds at the tipple (Tr. 4). Since the evidence of a violation of the sedimentation pond requirements of 30 CFR 715.17(a) is undisputed, Notice of Violation No. 80-2-18-6 is sustained.

The June 6, 1980, decision below is reversed and Notice of Violation No. 80-2-18-6 is reinstated and sustained.

NEWTON FRISHBERG
Administrative Judge

MELVIN J. MIRKIN
Administrative Judge

WILL A. IRWIN
Chief Administrative Judge

---

[3] As stated in *Drummond II*, *supra*, 2 IBSMA at 194 n.5, 87 I.D. at 349 n.5, the Board finds it irrelevant whether coal is transported from a mine to a preparation facility over public or private roads.

HARDLY ABLE COAL CO.

2 IBSMA 332

Decided *November 7, 1980*

Appeal by Hardly Able Coal Co. from an Apr. 25, 1980, decision of Administrative Law Judge David Torbett in Docket Nos. NX 9-109-R and NX 9-120-R, sustaining six violations contained in Notice of Violation No. 79-II-48-4 and sustaining Cessation Order No. 79-II-48-1 issued for failure to abate three of those violations.

Affirmed in part, affirmed as modified in part, and reversed in part.

1. Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Specificity

When a notice of violation is issued on the basis of an alleged violation of a regulation, but the regulation was amended prior to the inspection, the notice may be sustained only if the condition cited clearly remains a violation under the amendments and is so stated that the permittee knows or should know the nature of the violation cited and the remedial action required.

2. Surface Mining Control and Reclamation Act of 1977: Variances and Exemptions: Generally—Surface Mining Control and Reclamation Act of 1977: Water Quality Standards and Effluent Limitations: Generally

When a permittee alleges that a violation of the effluent limitations of 30 CFR 715.17(a) occurred because of unusual precipitation conditions, under 30 CFR 715.17(a)(1) it bears the burden of demonstrating entitlement to an exemption from those limitations.

APPEARANCES: Roger W. Ayers, Manchester, Kentucky, for Hardly Able Coal Co.; Charles P. Gault, Esq., Office of the Field Solicitor, Knoxville, Tennessee, and Marianne D. O'Brien, Esq., Office of the Solicitor, Division of Surface Mining, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

Hardly Able Coal Co. (Hardly Able) has sought review of that part of an Apr. 25, 1980, decision of Administrative Law Judge David Torbett that sustained six violations charged by the Office of Surface Mining Reclamation and Enforcement (OSM) in Notice of Violation No. 79-II-48-4 and that sustained Cessation Order No. 79-II-48-1 issued for failure to abate three of those violations. The notice and order were issued pursuant to the Surface Mining Control and Reclamation Act of 1977 (Act).[1] For the reasons discussed below, we affirm that decision in part, affirm it as modified in part, and reverse it in part.

Background

On July 27, 1979, OSM inspected a mine on Hacker Branch in Owsley County, Kentucky, operated by Hardly Able under a deep mine license. On July 31, 1979, OSM issued Notice of Violation No. 79–II–48–4 to Hardly Able. That notice alleged 10 violations, 6 of which remain in dispute.[2] Those violations, as cited in Notice of Violation No. 79–II–48–4, are: No. 5, failure to revegetate promptly to stabilize the soil surface as required by 30 CFR 715.20(a)(2); No. 6, failure to remove all organic material from the disposal area before placing spoil or waste material in that area in violation of "30 CFR 715.15(b)(4)"; No. 7, failure to construct terraces to stabilize the face of the fill as required by "30 CFR 715.15(b)(8)"; No. 8, failure to construct stabilized surface channels off the fill to carry drainage away from the fill as required by "30 CFR 715.15(b)(9)"; No. 9, failure to post a permit identification sign in violation of 30 CFR 715.12(b); and No. 10, failure of the discharge from the silt dam to meet the effluent limitations of 30 CFR 715.17(a). On Aug. 15, 1979, OSM issued Cessation Order No. 79–II–48–1 for failure to abate violations 5, 6, and 9 of Notice of Violation No. 79–II–48–4.

---

[1] Act of Aug. 3, 1977, 91 Stat. 445, 30 U.S.C. §§ 1201–1328 (Supp. II 1978).

Hardly Able applied for review of both the notice and order, and a hearing was held on Mar. 24, 1980. Violations 5–10 of the notice and the order were sustained in an Apr. 25, 1980, written confirmation of the ruling from the bench. Hardly Able appealed this portion of the decision and both parties filed briefs.

Discussion and Conclusions

Violations 6, 7, and 8 cited Hardly Able for improper construction of a valley fill under the regulations of 30 CFR 715.15. Those regulations were amended on May 25, 1979. The amendments became effective on June 25, 1979.[3] The inspection in this case took place on July 27, 1979, and the notice of violation was issued on July 31, 1979. Both of these dates are after the effective date of the amended regulations. The notice, however, was written in terms of the old regulations. No one brought these amendments to the attention of either the Administrative Law Judge or the Board.

[1] In *Island Creek Coal Co.*, 2 IBSMA 125, 87 I.D. 304 (1980), the Board upheld a notice of violation that failed to cite the proper subsection of the regulations when the narrative portion of the notice gave a reasonably specific description of a violation and the operator did not claim confusion as to the nature of the alleged violation or the remedial action required. The question in this case, therefore, is whether the narrative description in the notice issued to Hardly Able described with such reasonable specificity conditions that remained violations under the amended regulations that Hardly Able was not or could not have reasonably been confused by the incorrect citation.[4]

---

[2] Violations 2, 3, and 4 were vacated by OSM; violation 1 was vacated by the Administrative Law Judge and was not appealed to the Board.

[3] 44 FR 30628 (May 25, 1979).

[4] In *Grafton Coal Co., Inc.*, 2 IBSMA 316, 87 I.D. —— (1980), we held that the Administrative Law Judge had erred in vacating a notice of violation on the ground that it lacked reasonable specificity under sec. 521.

Violation 6 alleged that Hardly Able failed "to remove all organic material from the disposal area before placing material in the disposal area" in violation of "30 CFR 715.15(b)(4)."[5] The requirement to remove organic material from a fill area was moved from subsection (b)(4) to subsection (a)(3) by the amendment and the requirement now reads: "All vegetative and organic materials shall be removed from the disposal area * * *." Hardly Able did not dispute that organic material had been left in the fill, but instead introduced testimony that its officials felt that trees would help to stabilize the fill (Tr. 97). Because the narrative portion of the notice describes with reasonable specificity a violation of the regulations and because Hardly Able did not allege any confusion over that requirement, violation 6 of Notice of Violation No. 79–II–48–4 is sustained and the decision below on this violation is affirmed as modified by this discussion.

Violation 7 cited Hardly Able for "failure to construct terraces to stabilize the face of the fill as required by * * * 30 CFR 715.15(b)(8)."[6] Subsection (b)(8), which mandated the use of terraces, was removed in the May 1979 amendments. Subsection (a)(8) now states: "Terraces may be utilized to control erosion and enhance stability if approved by the regulatory authority and consistent with [the design and construction requirements of] Section 715.14(b)(2)." Under the amended regulations, therefore, the failure to construct terraces is no longer a violation in itself. Violation of the notice of violation is vacated and the decision below on this violation is reversed.

Violation 8 alleged that Hardly Able had failed "to construct stabilized surface channels off the fill to carry drainage away from the fill as required by * * * 30 CFR 715.15(b)(9)." OSM required Hardly Able "to construct stabilized surface channels off the fill to carry drainage away from the fill."[7] This subsection of the regulations was also deleted in the amendments. Although it is arguable that the requirements of subsection (b)(9) are still found in either subsection (b)(4) or subsection (d)(4), any replacement for that subsection is not clear and unambiguous. Furthermore, it appears that the amended regulations may have added new requirements. In *Island Creek*, *supra*, 2 IBSMA at 128, 87 I.D. at 305, we held that "[w]here regulations are complicated and remedies may be quite expensive, as is true under the Act, general guidance is not enough." It is not clear that the violation alleged remains a violation or what remedial action would be required to comply with the amended regulations. Therefore, violation 8 is vacated and the

---

F.N. 4—Continued

(a)(5) of the Act on his own motion when the parties expressed no confusion over the nature of the violation alleged. This case differs from *Grafton* in that here the conditions cited may no longer constitute violations because of the amendment to the regulations.

[5] Notice of Violation No. 79–II–48–4.

[6] *Ibid.*

[7] *Ibid.*

decision below on this violation is reversed.

[2] Violation 10 dealt with the failure of a discharge to meet the effluent limitations of 30 CFR 715.17 (a). Hardly Able did not dispute the fact of violation, but instead argued only that it had been a wet summer. OSM notes that the precipitation exemption to the effluent limitation is found in 30 CFR 715.17(a)(1).[8] This regulation requires the permittee to demonstrate that the violation occurred because of a precipitation event at least as large as that specified in the regulation. Hardly Able failed to meet its burden of demonstrating entitlement to an exemption. The Administrative Law Judge's decision on violation 10 is affirmed.

Violations 5, revegetation, and 9, signs, raised factual questions that were decided against Hardly Able. We see no reason to disturb those findings and, therefore, affirm the decision below on these violations.

The Apr. 25, 1980, decision is affirmed as to violations 5, 9, and 10; affirmed as modified as to violation 6; and reversed as to violations 7 and 8 of Notice of Violation No. 79-II-48-4. The decision upholding Cessation Order No. 79-II-48-1 is affirmed.

NEWTON FRISHBERG
Administrative Judge

WILL A. IRWIN
Chief Administrative Judge

MELVIN J. MIRKIN
Administrative Judge

ALASKA GATEWAY SCHOOL DISTRICT

5 ANCAB 111

Decided *November 12, 1980*

Appeal from the Decision of the Alaska State Office, Bureau of Land Management F-14943-B.

Dismissed.

1. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Standing

Where the Alaska Gateway School District claims only prospective ownership in lands and there is no evidence in the record that the School District has taken steps to obtain title pursuant to AS 14.08.151(b), the School District cannot be found to claim a property interest in such lands, within the meaning of 43 CFR 4.902, by reason of prospective ownership.

2. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Standing

While a "property interest" sufficient to confer standing under 43 CFR 4.902 need not be a vested interest, it may not be completely speculative.

---

[8] This regulation was suspended on Dec. 31, 1979 (44 FR 77451). The summary published with the notice of suspension states that operations will still be subject to the effluent limitations of sec. 715.17(a), and that OSM will give exemptions from those limitations on the basis of EPA's revised precipitation event regulations found in 44 FR 76791 (Dec. 28, 1979). These regulations also place the burden of proving entitlement to an exemption on the operator.

APPEARANCES: Tim MacMillan, Esq., and Joe P. Josephson, Esq., Josephson & Trickey, for Alaska Gateway School District; Thomas E. Meacham, Assistant Attorney General, Office of the Attorney General, for State of Alaska; Michael W. Sewright, Assistant Attorney General, Office of the Attorney General, for State of Alaska, Depts. of Transportation and Education; Elizabeth S. Taylor, Esq., for Doyon, Limited; Elizabeth J. Barry, Esq., Office of the Regional Solicitor, for the Bureau of Land Management; James B. Gottstein, Esq., Goldberg & Gottstein, for Tanacross, Inc.

OPINION BY ALASKA NATIVE CLAIMS APPEAL BOARD

On May 23, 1980, the Bureau of Land Management (BLM) issued its Decision, entitled, "Determination of Dual Core Township for Tanacross Incorporated Decision of September 14, 1976, vacated Decision of January 24, 1977, vacated." The BLM decided that T. 18 N. and T. 19 N., R. 11 E., Copper River meridian, are both considered to be core townships for Tanacross, Alaska. This decision dealt with the dual core township issue and did not decide on Tanacross, Inc.'s (Tanacross) land selection applications F–14943–B and F–19155–17; the decision on land conveyance is to be made at a future date.

On June 20, 1980, the appellant, Alaska Gateway School District, filed its Notice of Appeal from the decision of the BLM.

The appellant in its Statement of Reasons and Interest Affected, filed July 21, 1980, raises two issues:

> I The detemination by the BLM that Tanacross, Inc. is entitled to a dual township status is contrary to the law and not in accord with the facts.
>
> * * * * *
>
> II The Tok Dormitory site located in Township 18 North, Range 13 East, CRM, should be excluded from selection by Tanacross, Inc.

The appellant states that as a rural educational attendance area (REAA) it is authorized to operate public schools and provide educational services pursuant to Alaska law (AS 14.08.011, *et seq.*); it is entitled to acquire and own land (AS 14.08.151) and therefore has an interest in the land as a prospective owner.

AS 14.08.151, cited by the School District provides:

> (a) Except as provided in (b) of this section and § 161(g) of this chapter, the ownership of land and buildings used in relation to regional educational attendance area schools shall remain vested in the state, and use permits shall be given to the regional school boards.
>
> (b) A regional school board may, by resolution, request, and the commissioner of the department having responsibility shall convey, title to land and buildings used in relation to regional educational attendance area schools. If the state holds less than fee title to the land, the commissioner of the department having responsibility shall convey the entire interest of the state in the land to the regional school board. (§ 2 ch. 124 SLA 1975; am §§ 2, 3 ch 147 SLA 1978).

AS 14.08.161(g) provides:

> Title or sufficient interest determined acceptable by the department to an approved site for a school building to be constructed, repaired or improved by a regional school board shall be vested in the state or in the respective regional school board. (§ 3 ch 57 SLA 1976; am §§ 4, 5 ch 147 SLA 1978)

[1] While the appeal record shows that the legislature has appropriated funds for an athletic facility for acquisitiion pursuant to AS 14.08.161(g), the Alaska Gateway School District claims only prospective ownership pursuant to AS 14.08.151(b). There is no evidence in the record that the Alaska Gateway School District has taken steps pursuant to AS 14.08.151(b) for conveyance of title.

The BLM in its Answer states that "[t]he decision appealed from does not purport to convey any lands whatsoever, nor does it address the question of whether the dormitory site is 'public land' within the meaning of § 3(e) of ANCSA." The BLM also informs the parties that appellant's argument that the Tok Dormitory Site, in T. 18 N., R. 13 E., C.R.M., should be excluded from the selection of Tanacross, is premature; the issue will be ripe for appeal at such time as the BLM decides to approve or reject a Native selection of these lands.

Tanacross, in its Answer, filed Sept. 25, 1980, suggests that the appellant's appeal is premature because the BLM has not decided on lands conveyance and therefore should be dismissed

Doyon, Ltd., in its Answer, filed Oct. 3, 1980, moves the Board to dismiss the appellant for lack of standing required by 43 CFR 4.902.

The first question before the Board is whether or not the appellant had standing to appeal. The Board, on Sept. 30, 1980, issued an Order to Show Cause as to why this appeal should not be dismissed for lack of standing pursuant to 43 CFR 4.902. The order stated, in part:

> Because the decision of BLM appealed does not deal with lands at this time, because it is not clear whether the appellant is competing for interest in the land as a basis for standing to appeal, and because the appellant appears to claim only a prospective, rather than a present, interest in the disputed land, the Board hereby Orders the appellant to show cause, within ten (10) days from the date of this Order, why its appeal should not be dismissed at this time for lack of standing pursuant to 43 CFR 4.902.

On Oct. 10, 1980, appellant filed a motion to modify the Order to Show Cause by granting a time extension to Oct. 25, 1980. The motion was granted on Oct. 16, 1980. Appellant did not and has not responded to the Board's order.

[2] ANCAB, in *Appeal of State of Alaska*, 3 ANCAB 196, 217, 86 I.D. 225, 234 (1979) [VLS 78–42], in deciding on the question of standing to appeal, held that "[w]hile a 'property interest' sufficient to confer standing under [43 CFR] section 4.902 need not be a vested interest, it may not be completely speculative." It is the Board's conclusion that where the appellant's

"interest" in land is based only on prospective ownership at some future time, the appellant's "interest" is too speculative to constitute a "property interest" under 43 CFR 4.902.

Therefore, the Board concludes that the appellant, Alaska Gateway School District, lacks standing to bring this appeal, and the appeal is hereby dismissed.

Abigail F. Dunning
Administrative Judge

Joseph A. Baldwin
Administrative Judge

REIMBURSEMENT FOR GEOLOGICAL AND GEOPHYSICAL DATA AND INFORMATION; EXXON'S PETITION TO REVISE 30 CFR PARTS 250, 251 AND 252

M-36924

November 17, 1980

Outer Continental Shelf Lands Act: Oil and Gas Information Program: Reimbursement

The U.S. Geological Survey has a right to look at all of a lessee's geological and geophysical data and information. If it keeps the lessee's copy, it must pay the lessee a reasonable sum for reproduction costs. In certain situations, the Survey must also pay the lessee a reasonable sum for processing geophysical data.

Outer Continental Shelf Lands Act: Oil and Gas Information Program: Secretary's Access to Data and Information

Sec. 26(a)(1)(A) applies to geological and geophysical data and information only. Other types of data and information are gathered under other sections of the Act.

Outer Continental Shelf Lands Act: Geological and Geophysical Exploration: Reimbursement

The U.S. Geological Survey must pay permittees reasonable reproduction costs for geological data and information submitted under sec. 26.

Outer Continental Shelf Lands Act: Oil and Gas Information Program: Secretary's Access to Data and Information

The Secretary may require permittees to ship data and information to him for review. If he then decides to keep them, he must pay the reimbursement required by sec. 26.

To: Secretary
From: Solicitor
Subject: Reimbursement for Geological and Geophysical Data and Information; Exxon's Petition to Revise 30 CFR Parts 250, 251 and 252

Exxon Co., U.S.A. has asked you to change several of the new rules governing activities on the Outer Continental Shelf (OCS). It claims that several of these rules violate the Outer Continental Shelf Lands Act, *as amended* (or "the Act)." Broadly speaking, the petition raises two issues of law. The first is the scope of the Oil and Gas Information Program in sec. 26 of the Act. The second is the legality of the rule allowing the Director, USGS, to order permittees to ship data to him for his review.

Background

In 1978, after 5 years of study and debate, Congress amended the original Outer Continental Shelf Lands Act of 1953. In light of these amendments, the U.S. Geological Survey realized it would have to change some of the Department's regulations. It thus began the process of notice-and-comment rulemaking.

On Aug. 7, 1979, the Department published the first of a series of final rules. This was 30 CFR Part 252, entitled "Outer Continental Shelf Oil and Gas Information Program." 44 Fed. Reg. 46404 (Aug. 7, 1979). Next, the Department published sections of its revised regulations for oil, gas, and sulphur operations on the OCS. 44 Fed. Reg. 53686 (Sept. 14, 1979); 44 Fed. Reg. 61886 (Oct. 26, 1979); and later 45 Fed. Reg. 15128 (Mar. 7, 1980); and 45 Fed. Reg. 29280 (May 2, 1980). Finally, the Department published its revised rules for geological and geophysical explorations on the OCS. 45 Fed. Reg. 6338 (Jan. 25, 1980).

The oil and gas industry is unhappy with several of the new regulations. Exxon's petition challenges the legality of some of them.

Conclusions

Sec. 26(a)(1)(A) applies to geological and geophysical data and information only. Sec. 26(a)(1)(C) generally requires the Department to reimburse lessees and permittees when it keeps copies of this data and information. Both 30 CFR § 251.13 and 30 CFR Part 250 must be revised to provide the reimbursement required by § 26 of the Act.

The Secretary has authority under § 26(a)(1)(A) to regulate the method of his access to data and information. He may require lessees and permittees to ship them to him at their expense. After reviewing them, he may return them or may keep them. If he keeps them, he must pay the reimbursement required by § 26.

Analysis

I

Exxon's petition challenges six sections of Title 30, CFR, for their failure to comply with the reimbursement section of the 1978 Amendments. § 26(a)(1), 43 U.S.C. § 1352(a)(1). This section provides in part:

> Sec. 26. Outer Continental Shelf Oil and Gas Information Program.—(a)(1)(A) Any lessee or permittee conducting any exploration for, or development or production of, oil or gas pursuant to this Act shall provide the Secretary access to all data and information (including processed, analyzed, and interpreted information) obtained from such activity and shall provide copies of such data and information as the Secretary may request. Such data and information shall be provided in accordance with regulations which the Secretary shall prescribe * * *.
>
> (C) Whenever any data and information is provided to the Secretary, pursuant to subparagraph (A) of this paragraph—
>
> (i) by a lessee, in the form and manner of processing which is utilized by such lessee in the normal conduct of his business, the Secretary shall pay the reasonable cost of reproducing such data and information;

(ii) by a lessee, in such other form and manner of processing as the Secretary may request, the Secretary shall pay the reasonable cost of processing and reproducing such data and information;

(iii) by a permittee, in the form and manner of processing which is utilized by such permittee in the normal conduct of his business, the Secretary shall pay such permittee the reasonable cost of reproducing such data and information for the Secretary and shall pay at the lowest rate available to any purchaser for processing such data and information the costs attributable to such processing; and

(iv) by a permittee, in such other form and manner of processing as the Secretary may request, the Secretary shall pay such permittee the reasonable cost of processing and reproducing such data and information for the Secretary, pursuant to such regulations as he may prescribe * * *.

(b)(1) Data and information provided to the Secretary pursuant to subsection (a) of this section shall be processed, analyzed, and interpreted by the Secretary for purposes of carrying out his duties under this Act.

(2) As soon as practicable after information provided to the Secretary pursuant to subsection (a) of this section is processed, analyzed, and interpreted, the Secretary shall make available to the affected States, and upon request, to any affected local government, a summary of data designed to assist them in planning for the onshore impacts of possible oil and gas development and production. Such summary shall include estimates of (A) the oil and gas reserves in areas leased or to be leased, (B) the size and timing of development if and when oil or gas or both, is found, (C) the location of pipelines, and (D) the general location and nature of onshore facilities * * *.

Sec. 26 is not the only section of the Act allowing the Secretary to gather information. Under sec. 604, 43 U.S.C. § 1863, the Secretary can gather information on how well lessees are giving minorities and women equal opportunity in employment and contracts. Under sec. 18(g), 43 U.S.C. § 1344(g), he may obtain any information "which may be necessary to assist him in preparing any environmental impact statement and in making other evaluations [under the Act]." Under sec. 5, the Secretary has always had the authority to get information from lessees whenever it is "necessary and proper" to help him prevent waste, conserve natural resources, and protect correlative rights on the Outer Continental Shelf. 43 U.S.C. § 1334 (a). Thus, the authors of the Conference Committee report were speaking loosely when they said that "Section 26 describes the procedures for obtaining and releasing information from lessees and permittees." S. Rep. No. 95–1091, 95th Cong., 2d Sess. 119 (1978). Sec. 26 merely regulates how the Secretary gathers and releases the data and information described in sec. 26(a).

The text and legislative history of this section convince me that Congress is referring only to geological and geophysical data and information. Other types of scientific data are gathered under other sections of the Act. I do not reach this conclusion easily but only after weighing the statutory language of, and the purposes behind, the Oil and Gas Information Program.

I start with the language of the statute itself. Sec. 26(a)(1)(A) gives the Secretary the right to look at "all data and information (including processed, analyzed, and interpreted information)" which lessees and permittees gather from exploring for, developing, and producing oil or gas on the OCS. Traditionally, of course, the oil and gas industry has been chiefly interested in gathering information on the rock strata underground. Industry makes its money from finding, producing, and selling oil and gas; so it depends on geological and geophysical information for its livelihood. But industry does gather other information in the course of its activities. At first glance, sec. 26 might seem to include all these types of information. But nothing in the legislative history supports such a reading.

The idea of an OCS Oil and Gas Information Program first appeared in the proposed Energy Supply Act of 1974. That proposal would have added a new sec. 19, entitled Federal Outer Continental Shelf Oil and Gas Survey Program, to the original OCS Lands Act:

> SEC. 19. (a) The Secretary is authorized and directed to conduct a survey program regarding oil and gas resources of the Outer Continental Shelf. This program shall be designed to provide information about the probable location, extent, and characteristics of such resources in order to provide a basis for (1) development and revision of the leasing program required by section 18 of this Act, (2) greater and better informed competitive interest by potential producers in the oil and gas resources of the Outer Continental Shelf, (3) more informed decisions regarding the value of public resources and revenues to be expected from leasing, and (4) the mapping program required by subsection (c) of this section * * *.
>
> (h) The Secretary shall, by regulation, require that any person holding a lease issued pursuant to this Act for oil or gas exploration or development on the Outer Continental Shelf shall provide the Secretary with any existing data (excluding interpretation of such data) about the oil or gas resources in the area subject to the lease. The Secretary shall maintain the confidentiality of all proprietary data or information until such time as he determines that public availability of such proprietary data or information would not damage the competitive position of the lessee.

S. Rep. No. 93–1140, 93rd Cong., 2d Sess. 114–15 (1974).

A comparable provision appeared in the 94th Congress' proposed Outer Continental Shelf Management Act of 1975, Senate Bill 521. S. Rep. No. 94–284, 94th Cong., 1st Sess. 86–87 (1975). The Committee report accompanying the bill noted:

> * * * that the government must have better information about the resources it owns than it has had in the past * * *. Subsection 19 provides that any person holding an oil or gas lease shall provide the Secretary with any existing data (excluding interpretation of such data) about the oil or gas resources in the area subject to the lease * * *. The Committee does not intend that this provision be applied to leases issued before enactment of S. 521. *Id.* at 26–27.

Senate Bill 521 changed the title of proposed sec. 19 to "Federal Outer Continental Shelf Oil and Gas Information Program." It also hanged the fourth purpose of the rogram: the mapping program was dropped in favor of "assisting tate and local government agenies in assessing the likely impacts f the development of such public esources." *Id.* at 86.

The current scheme for sec. 26 did not appear until 1976 in the House's proposed Outer Continental Shelf Lands Act Amendments of 1976. H. Rep. No. 94–1084, 94th Cong., 2d Sess. 23–25 (1976). The proposed § 26 differed from its Senate predecessor in three respects. First, it dropped the four specific purposes of the Information Program and, instead, directed the Secretary to process, analyze, and interpret the data and information "for purposes of carrying out his duties under this Act." *Id.* at 24. Second, it required the Secretary to pay reproduction costs and some reprocessing costs; the Senate version had required neither. Third, it applied to both lessees and permittees and included interpreted information; the Senate version had been limited to lessees and did not include interpreted information.

This third difference is especially significant. It suggests that when Congress said "all data and information" in § 26(a)(1)(A), it was responding to the more limited Senate version. In other words, Congress wanted the Secretary to get all data and information *about the oil and gas resources* of the OCS. This reading of sec. 26 is borne out by other evidence in the legislative history.

First, members of Congress who commented on § 26 almost always did so when discussing oil and gas resources. For example, the House debates on July 21, 1976, produced the following exchange:

> **Mr. Seiberling**: * * * The question is whether only the big oil companies, who can afford it, are going to do all the exploratory drilling and then keep the results close to the chests * * *. Not only should the United States have as much information as the bidders, but all bidders should have the same basic information * * *.
>
> **Mr. Bell**: Does not the United States now have that information? * * *
>
> **Mr. Seiberling**: They do not have it * * *.
>
> **Mr. Bell**: * * * Under section 26 of this bill, that provides the Government with this information * * *.

122 Cong. Rec. 7479 (July 21, 1976). Later, Representative Fish objected to language in proposed sec. 506 [now § 606] which stated that the government lacked basic energy information (such as estimates of oil and gas reserves).

> **Rep. Fish**: * * * I think what it says is totally erroneous and misleading. Mr. Chairman, would the gentleman turn to [proposed § 26(b)] * * *. I think we have all the information we need today.

124 Cong., Rec. 594 (Feb. 2, 1978). Still later, Representative Dingell pointed out that nothing in sec. 26, "or in other information-gathering provisions of the OCS Act, * * * affect the authorities of the Secretary of Energy or the Federal

Energy Regulatory Commission to collect * * * energy data * * *." 124 Cong. Rec. 8882 (Aug. 17, 1978). Most persuasive, however, is the remark of Representative Murphy, chairman of the 1978 Conference Committee on the proposed Act and sponsor of the House version. "[Sec. 26 provides] for an information program in order to assess the Nation's OCS oil and gas resources so that the Government will receive a true value for those resources." The only remark suggesting that § 26 (a)(1)(A) might be broader is Representative Fish's:

> Our amendment [to § 26] sets forth the scope of information to be made available and the way to [sic, it?] will be passed along. Under the amendment, states will, for the first time, receive all the information they need to effectively carry out their constitutional police power functions * * *.

122 Cong. Rec. 5327 (June 4, 1976). But here we must remember that § 26(a)(2) gives the Secretary another source of information: other federal agencies. Sec. 26 does not draw solely on lessees and permittees. Thus, Representative Fish's remark sheds little light on the problem. In any event, I can find no specific evidence in these remarks that § 26(a)(1)(A) applies to anything other than geological and geophysical data and information.

Second, Representative Murphy prepared a chart for the Congressional Record, in which he compared existing agency regulations with the proposed House bill. His purpose was to prove that the bill did not create a "regulatory nightmare." I think it significant that he found § 26 comparable to two existing rules only: those giving the Secretary access to certain types of geological and geophysical data and information. See 122 Cong. Rec. 5326 (June 4, 1976).

Consequently, I conclude that § 26 (a)(1)(A) applies to geological and geophysical data and information only. But our journey is not over. Exxon's petition claims in effect that the Department must reimburse companies under § 26 whenever it gathers this data and information. In other words, the Department's reason for gathering the information is irrelevant under § 26.

Traditionally, the Department has required industry to submit this information for two purposes. The first is to assure that operators are conducting safe drilling operations. The second is to evaluate the oil and gas resources of the OCS. As we have seen, the legislative history of § 26 suggests that Congress was interested more in the second purpose. Sec. 26(b), however, cannot be read so narrowly. Although the original version of the Information Program did have four limited purposes, the enacted version does not. It refers generally to the Department's duties under the Act. Furthermore, Representative Murphy's chart of § 26 included § 250.95 of the regulations, a rule serving both purposes. See 122 Cong. Rec. 5326 (June 4, 1976). The principle of sec. 26(b) is broad enough to encompass both purposes. Generally then, anytime the Department asks for and keeps copies of geological or geophysical data and information, it must pay reasonable reproduction costs. In certain situations, it must also pay processing costs, as described in § 26(a)(1)(C). 43 U.S.C. § 1352(a)(1)(C).

The six challenged regulations all appear to allow the Geological Survey to ask for geological and geophysical data and information. See 30 CFR §§ 250.12(d), 250.34–1(k) and –2(n), 250.39, 250.40 (assuming that directional surveys are geological information), 250.95, and 251.13. As a general proposition, sec. 26(a)(1)(C) applies to all these sections. The Department must amend § 251.13 and must add a new reimbursement section to 30 CFR Part 250. In redrafting the regulations, however, the Department may find that the application of sec. 26 to certain matters will lead to a result not intended by Congress. I will review these cases whenever they arise.

II

Exxon's petition also argues that § 251.12(b) goes beyond the requirements of sec. 26 of the Act. Under this regulation, the Director may request a permittee to deliver data or information to the Regional Office for inspection. If the Director then chooses to keep the data or information, he must reimburse the permittee for reproduction and processing to the extent required by § 26(a)(1)(C). But if the data and information do not help the Director, he may send them back to the permittee. The permittee pays the cost of shipping the data or information to the Regional Office, and the USGS pays the cost of shipping it back.

The Director's alternative is to send a representative to the permittee's office to inspect the data or information, where the Director's representative would look at the same documents or printouts that the Director can request under § 251.12(b). Ordinarily, this method of access is convenient. However, if the documents to be reviewed are numerous, the representative might need several days to inspect them. The representative would have to be fed, lodged, and transported at public expense. The permittee, on the other hand, would still have to pay its employees to gather the documents for inspection, and would still have to pay to have the documents printed out of the computer or other tape. From the permittee's point of view, the only real difference between these two methods is that, under the first method, the permittee has to pay one-way shipping costs.

Sec. 26(a)(1)(A) requires permittees to "provide the Secretary access to all data and information * * * obtained from such [exploration] activity and shall provide copies of such data and in-

best copy available

formation as the Secretary may request. Such data and information shall be provided in accordance with regulations which the Secretary shall prescribe." Thus, the issue is this: given that the Secretary has the authority to regulate the manner in which he may have access to this data and information, is it unreasonable for him occasionally to ask permittees to pay one-way shipping costs? It is not. Shipping costs are small by any standard. The burden that this requirement places on permittees is minimal. Sec. 251.12(b) is a reasonable exercise of the Secretary's authority.

I also note that Congress incorporated part of the Department's existing reimbursement rule in § 26(a)(1)(C). See S. Rep. No. 95-1091, 95th Cong., 2d Sess. 119 (1978). This rule, 30 CFR § 251.13(b), did not reimburse permittees for shipping costs. See Assistant Solicitor Ferguson's unpublished memorandum of Dec. 2, 1976. Congress obviously has entrusted this little matter to the Secretary's discretion.

III

One question needs only brief discussion. Exxon claims that 30 CFR §§ 251.11 and 251.12 place an unreasonable burden on permittees to notify the Director of the acquisition, analysis, processing, or interpretation of geological or geophysical data collected under the permit. Exxon apparently is worried that this rule requires it to give the Director minute-by-minute, datum-by-datum notice of changes in processing or interpretation. Sec. 26 gives the Secretary broad access to this information, but the use of the authority must be subject to a rule of reason.

I am told that the Survey does not mean to require continual notification as each new thought pops into the permittee's head.

Now that the Survey has formed its position, it would be a good idea to rewrite the rules so that they accurately explain what permittees must do.

Clyde Martz,
Solicitor.

TOLLAGE CREEK ELKHORN MINING CO.

2 IBSMA 341

Decided *November 24, 1980*

Appeal by Tollage Creek Elkhorn Mining Co. from a Jan. 31, 1980, decision of Chief Administrative Law Judge L. K. Luoma upholding the issuance of a notice of violation for failure to restore an area to approximate original contour with all highwalls eliminated. Docket No. NX 0-30-R.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Backfilling and Grading Requirements: Highwall Elimination—Surface Mining Control and Reclamation Act of 1977: Roads: Generally

In a steep slope mining operation all highwalls must be completely backfilled after mining is concluded, even where retention of an access road has been approved as part of a postmining land use.

2. Surface Mining Control and Reclamation Act of 1977: Initial Regulatory Program: Generally

Compliance with state mining permit conditions does not excuse noncompliance with the initial Federal performance requirements.

3. Surface Mining Control and Reclamation Act of 1977: State Regulation: Generally

The requirement of sec. 505(b) of the Act, 30 U.S.C. § 1255(b) (Supp. II 1978), that the Secretary of the Interior set forth any state law or regulation which is construed to be inconsistent with the Act does not impose the obligation on the Secretary of designating every state interpretation of state law which might be inconsistent with Federal law.

APPEARANCES: Charles J. Baird, Esq., Baird and Baird, Pikesville, Kentucky, for Tollage Creek Elkhorn Mining Co., for intervenor Oscar W. Thompson, Jr., and for amicus curiae Coal Operators & Associates, Inc.; Robert S. More, Esq., Office of the Field Solicitor, Knoxville, Tennessee, Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Division of Surface Mining, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

Tollage Creek Elkhorn Mining Co. (Tollage Creek) has appealed from a Jan. 31, 1980, decision of Chief Administrative Law Judge L. K. Luoma upholding the issuance of Notice of Violation No. 79–2–66–31 which charged Tollage Creek with failure to restore the land to its approximate original contour with all highwalls,[1] spoil piles, and depressions eliminated in violation of sec. 515(b)(3) of the Surface Mining Control and Reclamation Act of 1977 (Act).[2] For the reasons set forth below, we affirm.

Procedural and Factual Background

On Nov. 7, 1979, an Office of Surface Mining Reclamation and Enforcement (OSM) inspector visited Tollage Creek's surface coal mining operation in Pike County, Kentucky, and issued Notice of Violation No. 79–2–66–31. The notice charged a violation of 30 U.S.C. § 1265(b)(3) (Supp. II 1978) for "[f]ailure to restore to the approximate original contour of the land with all highwalls, spoil piles, and depressions eliminated."[3] On Nov. 19, 1979, Tollage Creek filed an application for temporary relief. At the hearing held on Dec. 19, 1979, the Chief Administrative Law Judge considered the application for temporary relief also to be an application for review. In the Jan. 31, 1980, decision the validity of the notice was upheld.[4] Tollage Creek filed a timely notice of appeal. Subsequently, the Board granted Oscar W. Thompson, Jr., leave to intervene and granted Coal Operators & Associates, Inc., amicus status. All briefs have been submitted.

---

[1] Highwall is defined in 30 CFR 710.5 as: "[T]he face of exposed overburden and coal in an open cut of a surface or for entry to an underground coal mine."

[2] Act of Aug. 3, 1977, 91 Stat. 445, 486, 30 U.S.C. § 1265(b)(3) (Supp. II 1978).

[3] The area in question concerned about 500 feet of highwall. Approximately an additional 5,000 feet of exposed highwall remained on the operation but Tollage Creek was not required to eliminate it (Tr. 148). It had been created by Tollage Creek's mining operation prior to Dec. 31, 1978, pursuant to a small operator exemption received by Tollage Creek in accordance with 30 CFR 710.12.

Thompson is the surface owner of the entire Tollage Creek watershed in Pike County, Kentucky, consisting of 600 to 800 acres. He and his daughter maintain the only residences in the hollow. The Chief Administrative Law Judge made the following statement of facts (Decision at 3–4):

> Since 1964, Dr. Thompson has contacted several Governmental agencies concerning the feasibility of establishing a tree farm or commercial forest, however, he could not afford building the access roads and fire breaks necessary for a successful tree farm. He had the area timbered in 1968 by a lumber company and was dissatisfied with the results. The company which did the timbering had no feasible access to the trees and used a small bulldozer to go up and down the mountain to harvest the marketable trees. As a result of this timbering, there was significant damage to the property, including soil erosion. The owner stated he would not again consider the use of this method of timbering.
>
> In 1974 the owner began negotiations with applicant concerning development of the property. The owner had been approached by several other coal operators, but had denied the use of his surface to these other operators because he was not satisfied with their methods of reclamation. The applicant and the surface owner reached an agreement which provided that the applicant could surface mine the property if usable access roads were left to allow postmining use of the land.
>
> On July 13, 1979, the Bureau of Surface Mining Reclamation and Enforcement of the Commonwealth of Kentucky issued applicant a "Surface Disturbance Mining Permit."[5] The permit granted a vari-

---

[4] The Chief Administrative Law Judge stated at p. 6:

"Under the terms of the Act, I am forced to conclude that the notice of violation was validly issued. Such a finding, however, points up a basic flaw of the Act. Sections of the Act allow flexibility in requirements that land be restored to approximate original contour so that access roads can be built to facilitate postmining uses of the land, yet these same sections specifically state that all highwalls must be eliminated. In the present situation, however, an access road which would allow for postmining use of the land is difficult, if not impossible to construct unless some part of the highwall is left exposed. Further, retention of the highwall causes no damage to the environment. No allegations of environmental damage were made and no evidence of such was produced. In effect, this is such a situation where retention of the highwall should be allowed because its elimination will result in the consequent difficulty of access for valuable postmining use of the land. The situation is so unfair that it cries for legislative relief."

[5] Tollage Creek filed an application seeking a revision of Surface Disturbance Mining Permit No. 6483–77 (New No. 298–0911). The application contained the access road proposal. On Apr. 6, 1979 the Director of the Division of Permits for the Kentucky Bureau of Surface Mining Reclamation and Enforcement denied the application. Tollage Creek appealed the denial. On May 10, 1979, a hearing officer for the Commonwealth of Kentucky held a hearing and on June 21, 1979, he issued a recommended decision concluding that the road in question was in fact an access road and that an access road necessary to support a postmining land use is exempt from restoration to approximate original contour under the Kentucky definition of that term (Exh. A–1). The hearing officer's decision was approved by the Secretary, Kentucky Department for Natural Resources and Environmental Protection, on July 11, 1979 (Exh. A–2).

> ance allowing a haul road to be constructed concurrently with backfilling operations. The permit further provided that only the attendant highwall which is represented in the approved plan, and is necessary to maintain the stability of the backfill and provide access for the postmining land use, would be allowed to remain. Subsequent to the issuance of the permit, applicant began mining operations in a manner consistent with the permit issued by the State. * * *
>
> Provisions in permit applications submitted to the State which contain a postmining land use program are something of a rarity. In preparing the permit application, applicant's engineer performed a stability analysis regarding the placement of the road on the fill. Three separate positions were analyzed for stability, one being at the top of the fill, another being in the middle of the fill, and the third being at the bottom of the fill on the solid bench. The engineer stated that in computing the factor of safety of the fill, with the road in each of these three positions, only the road at the top of the fill resulted in a factor of safety greater than 1.5. On top of the fill the factor of safety for the road and fill area was 1.719. With the road in the middle of the fill, the factor of safety was 1.314 and at the bottom of the fill, the factor of safety was 1.079.
>
> * * * * *
>
> Respondent's inspector testified that leaving the highwall would cause no environmental damage and that, if an access road were to be constructed, he could think of no better site other than its present location.

Appellant's engineer testified that from a hydrological viewpoint it would be environmentally superior to have the road at the top of the fill rather than in the middle or at the bottom (Tr. 162). He stated that because of the company's method of operation the highwall is uniform and stable (Tr. 125). He indicated that under the company's plan the coal seams will be completely covered and any toxic material will be buried by at least 4 feet of nontoxic material (Tr. 141). A recognized expert on slope stability stated that the best location for a road at this site from the standpoint of stability and control of surface drainage would be at the top of the fill (Exh. A-16).

Discussion

Appellant was charged with violating sec. 515(b)(3) of the Act, 30 U.S.C. § 1265(b)(3) (Supp. II 1978). That section reads:

> (b) General performance standards shall be applicable to all surface coal mining and reclamation operations and shall require the operation as a minimum to—
>
> * * * * *
>
> (3) except as provided in subsection (c) of this section with respect to all surface coal mining operations backfill, compact (where advisable to insure stability or to prevent leaching of toxic materials), grade in order to restore the approximate original contour of the land with all highwalls, spoil piles, and depression eliminated. [6]

The implementing regulation, 30 CFR 715.14, states:

> In order to achieve the approximate original contour the permittee shall, except as provided in this section, transport, backfill, compact (where advisable to ensure stability or to prevent leaching of toxic materials), and grade all spoil ma-

---

[6] Subsec. (c) provides for an exception to the approximate original contour standard for mountaintop removal operations. Tollage Creek was involved in a steep slope operation.

terial to eliminate all highwalls, spoil piles, and depressions.[7]

[1] Appellant argues that the regulations specifically allow for retention of a highwall which is a part of an approved postmining land use. It alleges that 30 CFR 715.17(*l*)(1) creates the exception and that 30 CFR 715.14 is not applicable to the circumstances of this case in which retention of a road is approved as part of a postmining land use.[8] If only read against 30 CFR 715.14, 30 CFR 715.17(*l*)(1) might be interpreted as creating an exception to highwall elimination; however, one of the special performance standards applicable to steep slope mining, 30 CFR 716.2(b), specifically requires that the highwall shall be completely covered with spoil.[9] Attempting to give effect to all sections of the regulations, it appears that the language relied on by appellant in 30 CFR 715.17(*l*)(1) more clearly refers only to the requirement in 30 CFR 715.14 that lands be returned to approximate original contour.[10] Even the variance provisions of sec. 515(e)(1), 30 U.S.C. § 1265(e)(1) (Supp. II 1978), which are applicable only in the permanent regulatory program,[11] merely allow a variation from approximate original contour; the highwall is specifically required to be eliminated.[12] Thus,

---

[7] Sec. 515(e), 30 U.S.C. § 1265(e) (Supp. II 1978), allows for limited variances of the approximate original contour requirement. OSM interpreted that section as not having effect during the initial regulatory program. However, OSM published proposed rules in the *Federal Register*, 44 FR 61312 (Oct. 24, 1979), implementing a variance procedure during the initial regulatory program. Those rules have not been finalized. The preamble to the rules indicated that even if a variance from approximate original contour were available, complete backfilling of the highwall would be necessary. It was stated at 61313:

"Finally, proposed § 716.2(e)(4)(i) would require that the highwall be completely backfilled with spoil to achieve a static safety factor of at least 1.3. This two-pronged requirement is drawn from section 515(e)(1) of the Act which OSM reads to say that even where a variance is granted, complete backfilling and achieving stability are mandatory."

[8] 30 CFR 715.17(*l*)(1) states in pertinent part:

"All access and haul roads shall be removed and the land affected regraded and revegetated consistent with the requirements of § 715.14 and § 715.20, unless retention of a road is approved as part of a postmining land use under § 715.13 as being necessary to support the postmining land use or necessary to adequately control erosion and the necessary maintenance is assured."

[9] 30 CFR 716.2 reads:

"The permittee conducting surface coal mining and reclamation operations on natural slopes that exceed 20 degrees, * * * shall meet the following performance standards.

* * * * *

"(b) The highwall shall be completely covered with spoil and the disturbed are a [*sic*] graded to comply with the provisions of § 715.14 of this chapter."

The area in question in this case has a slope of 32 degrees.

[10] This interpretation is supported by language in the preamble to the initial program regulations addressed to comments on 30 CFR 715.14, comment 10, 42 FR 62644 (Dec. 13, 1977):

"10. A limited number of comments recommended retention of portions of the highwall. The recommendation was not accepted since the Act and the legislative history indicate that no highwalls are to be left after mining is completed. Highwall elimination is mandated in § 515(b)(3) of the Act as is attainment of the 'lowest practicable grade' in cases of inadequate overburden to fully grade to approximate original contour. Return to the 'appropriate original contour' to 'cover completely the highwall' is required in § 515(d) of the Act for steep slope areas."

[11] *See* n.7. *supra*.

[12] The following statement relative to the variance provision of sec. 515(e)(1) is contained in the legislative history of the Act, H.R. Rep. No. 493, 95th Cong., 1st Sess. 108–109 (1977):

"The Senate amendment provided a variance to the approximate original contour and the conclusion is inescapable that in a steep slope mining operation such as the one in this case, all highwalls, regardless of their purpose, must be completely backfilled.

[2] Appellant argues that the variance granted by Kentucky was part of its state mining permit and that the condition cited in the notice issued by OSM was one specifically allowed by its permit. However, compliance with state mining permit conditions does not excuse noncompliance with the initial Federal performance requirements. *Alabama By-Products Corp.*, 1 IBSMA 239, 86 I.D. 446 (1979); *Cedar Coal Co.*, 1 IBSMA 145, 86 I.D. 250 (1979). Appellant attempts to distinguish these cases by pointing out that both involved permits issued prior to the date of the initial program regulations (December 13, 1977), while Tollage Creek's permit was issued on July 13, 1979. However, this fact gives appellant less of a claim to a shield from Federal regulation than may have been made in the other cases.[13] Clearly, those cases are controlling herein.[14] Although appellant's state permit contained language allowing part of the highwall to remain in the area in question, Federal law requires the elimination of all highwalls and there is no provision for a variance from that requirement. In fact, sec. 502 (b) of the Act, 30 U.S.C. § 1252(b) (Supp. II 1978), sets forth that a state permit shall contain terms requiring compliance with Federal performance standards. Those standards include the restoration of approximate original contour and the elimination of all highwalls.

[3] Appellant also contends that OSM is estopped from asserting

---

backfilling highwalls completely for a wide range of post mining land uses. In addition, if 'sound engineering technology' indicated that the highwall could not be completely backfilled, then the operator would have been required to reduce the highwall to the maximum extent consistent with 'sound engineering technology' and develop a revegetation plan that is 'reasonably calculated' to screen the remaining highwall within 5 years. H.R. 2 included no such provisions.

"*Conferees agreed on a modified variance to the approximate original contour standard which requires that all highwalls are to be completely backfilled in every instance.* This amounts to a variance from the 'configuration' aspects of the regrading standard [See the definition, Sec. 701(2)]. This gives an opportunity for a broad range of postmining land uses on those operations which would result in a very wide bench accommodating both the stable and complete backfilling of the highwall as well as additional areas for the planned land uses. Conferees did not adopt the 'sound engineering technology' provision of S.7." (*Emphasis* added.)

[13] Sec. 502(b) of the Act, 30 U.S.C. § 1252 (b) (Supp. II 1978), provides that on and after May 3, 1978, all surface coal mining operations on lands on which such operations are regulated by a state must comply with certain performance standards of the Act.

[14] Appellant states that the holdings in *Cedar* and *Alabama By-Products* are contrary to two United States district court decisions involving similar circumstances, *Midland Coal Co.* v. *Andrus*, No. 79–112 (C.D. Ill., Dec. 21, 1979) (order granting preliminary injunction) and *Star Coal Co.* v. *Andrus*, No. 79–171–2 (S.D. Iowa, Feb. 13, 1980) (order granting preliminary injunction). Both decisions were appealed by the Secretary. Neither of those decisions require vacation of the notice in this case. The facts in those cases were very different from this situation. Both involved state determinations granting exemptions from prime farmlands requirements. There was no question that the states had the authority to grant such exemptions. The Secretary merely disagreed with the determinations. Here, Kentucky had no authority to grant a variance from the Federal requirement of complete highwall elimination.

the alleged violation because of the failure of the Secretary to designate an inconsistent state law as required by sec. 505(b) of the Act, 30 U.S.C. § 1255(b) (Supp. II 1978).[15] As pointed out by appellant, this section was intended to insure against any confusion concerning which statutes in a state would be applicable and which would not.[16] Appellant alleges that it was error for the Chief Administrative Law Judge to find no inconsistency. Appellant argues that there is a very significant difference in the definition of approximate original contour under Federal law and under Kentucky law, and that the Kentucky hearing officer relied on the difference language in the Kentucky law in concluding that it was not necessary to completely backfill and eliminate a highwall for an approved postmining land use.[17] We do not find this argument persuasive. The Act requires the Secretary to designate inconsistent state laws. That necessarily requires the designation of laws which are on their face inconsistent. The Kentucky definition of approximate original contour cited by appellant is not on its face inconsistent with Federal law. Although the Kentucky hearing officer apparently interpreted the language of the state definition of approximate original contour as allowing partially exposed highwalls to remain, the Secretary cannot be responsible for designating every state interpretation of state law which might be construed in a manner inconsistent with Federal law. Since the state is responsible for issuing permits which are consistent with Federal requirements, the state must assume the burden of conforming it permits to Federal standards during the initial program.

It is with difficulty that we have reached the result in this case. Common sense and fairness would appear to require an opposite result. The Federal law seems inescapable, however. Had Congress been presented with the factual situation herein, where elimination of the highwall would not benefit the environment but only burden the operator or landowner, it may have provided in the Act for some exception to the rigid backfilling requirement. Apparently, it was not. Clearly, it did not. We are con-strained to affirm the Chief Administrative Law Judge.[18]

---

[15] That section provides in pertinent part: "The Secretary shall set forth any State law or regulation which is construed to be inconsistent with this Chapter."

[16] S. Rep. No. 128, 95th Cong., 1st Sess. 73–74 (1977).

[17] The Kentucky definition, KRS § 350.010 (14), reads:

" 'Approximate original contour' means that surface configuration achieved by backfilling and grading of the mined area so that the reclaimed area, including any terracing or access roads (when not necessary to support its approved postmining use), closely resembles the general surface configuration of the land prior to mining and blends into and complements the drainage pattern of the surrounding terrain, with all highwall and spoil piles eliminated."

The definition in the Act, 30 U.S.C. § 1291 (2) (Supp. II 1978) is:

" '[A]pproximate original contour' means that surface configuration achieved by backfilling and grading of the mined area so that the reclaimed area, including any terracing or access roads, closely resembles the general surface configuration of the land prior to the mining and blends into and complements the drainage pattern of the surrounding terrain, with all highwalls and spoil piles eliminated."

Appellant has also raised constitutional issues which are beyond the authority of this Board to decide.

The decision appealed from is affirmed.

Newton Frishberg
Administrative Judge

CHIEF ADMINISTRATIVE JUDGE IRWIN CONCURRING:

A. P. Herbert's remarks are apt in this case:

> There is an old and somewhat foolish saying that "Hard cases make bad law," and therefore the law must be left as it is. It would be equally true to say, "Bad law makes hard cases," and therefore the law must be amended. The real truth lies somewhere between. Mere freaks of fortune should not be made an excuse for weakening a law which is sound. But a law which is seen to multiply hard cases, not through any accident but by its necessary elements, is not worth preserving, for the law was made for man, not man for the law.[1]

It is not for us to comment on the wisdom of the law, implemented in the Secretary's regulations, that highwalls be eliminated. It is for us to interpret and apply the law. And the law is clear even though its application in this case may be feckless. If its application is seen to multiply hard cases, presumably the Congress will amend it. But that is not our province.[2] The decision of the Chief Administrative Law Judge must be affirmed.

The dissent's suggestion that we should have modified the notice of violation in this case to eliminate any requirement to remove the highwall in question is, in my view, disingenuous.[3] The remedial action prescribed in the notice of violation was to "restore to the approximate original contour of the land with all highwalls, spoil piles and depressions eliminated."[4] Whatever may be the scope of authority in sec. 525(b), 30 U.S.C. § 1275(b) (Supp. II 1978), to modify a notice of violation or cessation order, it cannot include a modification that negates provisions of the law that are mandatory, as we have concluded those in this case are.

---

[18] This result would not appear to deprive the surface owner of his postmining land use. At the hearing appellant's engineer indicated that if sufficient funds were expended, an access road with a proper stability factor could be constructed with complete highwall elimination (Tr. 161–162).

[1] Herbert, *Uncommon Law* (New York, 1936) at 274. Justice Jackson's statement is also apropos: "We agree that this is a hard case but we cannot agree that it should be allowed to make bad law." *American Communications Comm.* v. *WOKO*, 329 U.S. 223, 229 (1946).

[2] As Justice Miller said in *United States* v. *Lee*, 106 U.S. 196, 220 (1882):

"No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.

"It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives."

[3] Not unlike Joab, who touched his brother Amasa's beard with his right hand, as though to kiss him, but shed his bowels to the ground with the blow of a sword held in the left. 2 *Samuel* 30:9–10. *See also*, 1 *Kings* 2:29–32.

[4] Exh. R–1. This, of course, parallels the language of sec. 515(b)(3) of the Act, 30 U.S.C. § 1265(b)(3) (Supp. II 1978).

WILL A. IRWIN
Chief Administrative Judge

ADMINISTRATIVE JUDGE MIRKIN PARTIALLY DISSENTING:

While I join with my colleagues in holding that the notice of violation was properly issued, I am mystified that, instead of using the tools that have been given us to rectify situations that defy "common sense and fairness" (p. 576, *supra*), or that constitute "feckless" applications of the law (p. 577, *supra*), one says Congress prevents the corrections and the other says that Supreme Court Justice Miller, deceased, will not permit it. So, while deploring the result, they affirm it.[1] It is not, however, the responsibility of either Congress or the late Justice Miller that common sense and fairness are here being debased by fecklessness. That is a result of action by this Board.

It is obvious that Congress believed that highwalls per se constitute environmental insults and that the only measurement required by the regulators would be one that determines the existence of highwalls rather than one that would determine actual harm from highwalls.[2] This is not a situation that "cries for legislative relief" (p. 572 n.4, *supra*). Even to suggest that the Secretary must go through the elaborate rulemaking process or that Congress must solemnly amend the Act in order to correct a perceived injustice to a single individual, whose situation defies literal duplication, amounts to a grotesquerie. This Board should not construe the law or its own powers in a manner so as to render it merely a checkpoint on the way to the courts who, because of our default, may become the real administrators of the program.[3]

The Board is authorized to modify enforcement actions. 30 U.S.C. § 1275(b) (Supp. II 1978); 43 CFR 4.1101(b); 43 CFR 4.1275. That we possess such a power is not to say that we should employ it indiscriminately; but where failure to use it results in a miscarriage of justice, we should not hesitate to utilize it. 43 CFR 4.1101(b). I cannot imagine a situation that would qualify more for intervention by us than this one.

The record discloses that no public interest would be served by requiring Tollage Creek to take the remedial action (elimination of the highwall) required by OSM. Thompson, the landowner, wants to develop a commercial forest on his land. As a preliminary to this project arrangements were made to have some of the land stripped of coal by

---

[1] Not unlike Lewis Carroll's walrus who wept at the deaths of the oysters he had invited to a picnic, wiping away the tears only when it did not interfere with his consumption of the next tasty little mollusk.

[2] *See* 30 U.S.C. §§ 1265(b)(3), 1265(d)(2), and 1265(e)(1) (Supp. II 1978); H. R. Rep. No. 493, 95th Cong., 1st Sess. 108–09; 112 (1977); H.R. Rep. No. 1445, 94th Cong., 1st Sess. 8, n.3 (1976).

[3] Up until now, the Board has not viewed itself to be so limited. *See Capitol Fuels, Inc.*, 2 IBSMA 261, 87 I.D. 430 (1980); *Wilkinson's, Inc.*, 1 IBSMA 1 (1978).

Tollage Creek. As part of a post-mining plan an access road was to be constructed when mining was completed. Engineering work was undertaken to determine the best way to construct a stable road. Utilization of a portion of the existing highwall was selected. The state mining authority approved this plan. The highwall is stable, all coal seams are (or will be) covered, and there is no toxic material or drainage.[4] In fact, approximately 90 percent of the road was constructed pursuant to provisions which exempted Tollage Creek from having to eliminate the highwall.[5] Eliminating the relatively small unexempted portion would not eliminate whatever danger OSM perceives. The cause of minimizing environmental degradation will not be served now by the action necessary to eliminate this highwall and the completion of the remainder of the roadway in a manner less stable than is proposed. Tollage Creek and Thompson are only to be unnecessarily penalized by this requirement.

What the Board should have done is either: (1) modify the decision below to eliminate any requirement to remove the highwall in question and affirm OSM's right to retain supervision over the maintenance of the remaining access road in accordance with the provisions of 30 CFR 715.17(*l*)(3); or (2) because of the apparent uncertainty, even on the part of OSM, as to the applicability of the highwall removal requirements to this situation, give prospective effect only to this decision and vacate the notice of violation.[6]

For these reasons I dissent from that portion of the decision requiring removal of the highwall.

MELVIN J. MIRKIN
Administrative Judge

BLACKWOOD FUEL CO., INC.

2 IBSMA 359

Decided *November 24, 1980*

Appeal by Blackwood Fuel Co., Inc., from that part of a Mar. 13, 1980, oral decision by Administrative Law Judge David Torbett, confirmed in writing on Mar. 31, 1980, sustaining two violations in Notice of Violation No. 80–II–

---

[4] Statements of fact in this dissent, unless otherwise indicated, are based on the findings set forth in the decision below at pages 2–4.

Although the Chief Administrative Law Judge determined that "the highwall is stable and consists of sandstone [and that the] coal seams are completely covered and there is no toxic material or drainage" (Decision at 4), the majority has substituted ellipses for that finding (p. 573, *supra*) and made its own determination from the transcript that the coal seam had not yet been covered. Whichever conclusion is proper is immaterial to my opinion.

[5] From the record it appears that approximately 5,000 feet of the road that would ultimately provide access to Thompson's property is in place (Tr. 118–24, 143–49). Tollage Creek proposes to construct approximately 500 feet more of access road (Tr. 148–49).

[6] On its face, 30 CFR 715.17(*l*)(1) appears to provide authorization for the sort of road Tollage Creek proposes to leave in place for the benefit of the landowner. It is only in reconciling this provision with 30 CFR 710.5, 715.14, and 716.2(b) that the Board concludes that Tollage Creek's proposal is prohibited by the regulations. In short, the regulations are not without ambiguity in this regard (as OSM acknowledges in its Brief at 4–6, and as is suggested by the inspector's initial uncertainty, *see* Exh. A–5, as to existence or not of a violation).

15–1 and denying temporary relief (Docket No. NX 0–107–R).

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Initial Regulatory Program: Generally—Surface Mining Control and Reclamation Act of 1977: State Regulation: Generally

During the initial regulatory program a critical determinant of the jurisdiction of the Office of Surface Mining Reclamation and Enforcement over a surface coal mining operation conducted on lands within a state is whether the operation is subject to state regulation within the scope of any of the initial Federal performance standards.

2. Surface Mining Control and Reclamation Act of 1977: Applicability: Initial Regulatory Program—Surface Mining Control and Reclamation Act of 1977: Initial Regulatory Program: Generally

The Office of Surface Mining Reclamation and Enforcement has jurisdiction to enforce the initial Federal performance standards against a surface disturbance in Kentucky of less than 2 acres and the Federal 2-acre exemption set forth in 30 CFR 700.11(b) is not applicable where the disturbance is physically related to a surface coal mining operation under permit from the Commonwealth of Virginia, and where the disturbance is not a discrete operation but was undertaken in furtherance of the Virginia operation.

APPEARANCES: Daniel R. Bieger, Esq., Norton, Virginia, for Blackwood Fuel Co., Inc.; Chewanney Brown, Esq., Mark Squillace, Esq., and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Division of Surface Mining, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

Blackwood Fuel Co., Inc. (Blackwood), has appealed from that part of a Mar. 13, 1980, oral decision of Administrative Law Judge David Torbett, confirmed in writing on Mar. 31, 1980, sustaining violations 2 and 3 [1] of Notice of Violation No. 80–II–15–1. We affirm the decision.

Procedural Background

On several occasions during December 1979 and January 1980 employees of the Office of Surface Mining Reclamation and Enforcement (OSM) visited Blackwood's surface coal mining operation (Virginia permit 801) located on the Virginia-Kentucky border in Wise County, Virginia. On Jan. 14, 1980, OSM served Notice of Violation No. 80–II–15–1 on Blackwood charging it with three violations of the Surface Mining Control and Reclamation Act of 1977 (Act) [2] and the initial program regulations. All three of the alleged violations concerned an area in Kentucky immediately adjacent to the permitted area in Virginia.

---

[1] Violation 2 charged a violation of 30 CFR 716.2(a)(1) for placing spoil on the downslope. Violation 3 charged a failure to pass surface drainage through a sedimentation pond in violation of 30 CFR 715.17(a).

[2] Act of Aug. 3, 1977, 91 Stat. 445, 30 U.S.C. §§ 1201–1328 (Supp. II 1978).

Blackwood filed an application for review of the notice and an application for temporary relief. At the conclusion of the hearing held on Mar. 13, 1980, the Administrative Law Judge announced his decision from the bench vacating violation 1 and sustaining violations 2 and 3.[3]

On Mar. 24, 1980, Blackwood filed a "Petition for Review of Administrative Ruling" with the Board seeking review of that part of the decision sustaining violations 2 and 3 and requesting temporary relief. On Mar. 31, 1980, the Administrative Law Judge confirmed his oral decision in writing. By letter dated May 5, 1980, counsel for Blackwood informed the Board that its petition was intended as a request for temporary relief and as a request for review of the merits of decision. By order of the Board dated May 15, 1980, Blackwood's request for temporary relief was denied.[4] OSM and Blackwood subsequently filed briefs.

Factual Background

Blackwood's Virginia permit 801 covers over 700 acres (Tr. 14). A portion of the permit abuts the Virginia-Kentucky state line near Stonega Gap on Black's Mountain (Exh. R-1; Tr. 15, 16). Blackwood does no actual mining itself on the permit area; it is presently mined by two contract miners—Park Coal Co. (Park) and Rawhide Coal Co. (Tr. 18, 19). The mining in the area of Stonega Gap is being done by Park (Tr. 19). The three coal seams that are being contour mined in this area extend through the mountain and outcrop in both Virginia and Kentucky (Tr. 14, 27, 34). To facilitate its mining of the highest of these seams, the 13th seam, Park began mining that seam in Kentucky, disturbing approximately 1½ acres (Tr. 21, 30, 34). This disturbance in Kentucky was immediately adjacent to and connected with Virginia permit 801 and provided the only access to the 13th coal seam in Virginia (Exhs. R-2, R-3; Tr. 20, 29, 30). The disturbance in Kentucky consisted of a coal pit for the removal of the 13th seam, and the overburden materials which were cast downslope (Exhs. R-3, R-7; Tr. 21). The coal pit created in Kentucky continued uninterrupted onto permit 801 in Virginia (Exhs. R-2, R-3; Tr. 26, 27, 29, 46). No drainage control was provided for the area disturbed in Kentucky (Tr. 21). A cut-through or "window" had been made which allowed water that had accumulated in the pit to escape from the pit area and wash down the mountainside (Exhs. R-4, R-5, and R-6; Tr. 31, 32).

---

[3] By sustaining those violations the Administrative Law Judge implicitly denied Blackwood's request for temporary relief.

[4] In the same order the parties were granted the opportunity to file briefs on other questions raised in the petition "including what authority exists for the Office of Surface Mining Reclamation and Enforcement to regulate the activities of Blackwood (or its subcontractors) in the Commonwealth of Kentucky and whether those activities are regulatable under Kentucky law by that jurisdiction."

At the time of the OSM inspection active mining operations were being conducted on the 13th seam in Virginia (Tr. 19). The bench created by the disturbances in Kentucky was being used to haul coal from, and gain access to, the 13th coal seam in Virginia (Tr. 20, 30). When the OSM inspector inquired as to the cause of the disturbance in Kentucky, he was informed by an employee of Blackwood that Park had disturbed the area to do remedial work on a haul road permitted in Kentucky to C & B Coal Co. (C & B) (Tr. 35).

The C & B haul road begins at Stonega Gap and roughly parallels the state boundary line on the Kentucky side of the mountain (Exh. R-1; Tr. 24, 25). The haul road was under permit to a 25- to 30-foot width all along its course in Kentucky (Tr. 39). The disturbance created by Park extended on both sides of the C & B haul road, and the coal seam removed by Park was approximately 20 feet below the surface of the haul road (Tr. 39, 40).

Discussion

[1] The Board has established that during the initial regulatory program a critical determinant of OSM's jurisdiction over a surface coal mining operation conducted on lands within a state is whether the operation is subject to state regulation within the scope of any of the initial Federal performance standards.[5] *James Moore*, 1 IBSMA 216, 221, 86 I.D. 369, 372 (1979); *Dennis R. Patrick*, 1 IBSMA 158, 86 I.D. 266 (1979). Both the Commonwealths of Virginia and Kentucky regulate surface mining within their respective boundaries. In fact, Kentucky regulates operations affecting 2 acres or less.[6] Appellant argues, however, that OSM has no jurisdiction to regulate the Kentucky disturbance because for operations of 2 acres or less Kentucky does not regulate spoil disposal or impose sedimentation pond requirements. Regardless of whether Kentucky regulates those particular activities on sites of 2 acres or less, it is clear that on such sites some aspects of surface mining activities within the scope of the initial Federal performance standards are subject to regulation by Kentucky.
Therefore, OSM has jurisdiction t
enforce all the initial Federal per

---

[5] During the initial regulatory progra
OSM's authority to regulate surface coal mi
ing operations is based on sec. 502(a) of th
Act, 30 U.S.C. § 1252(a) (Supp. II 1978
which states: "No person shall open or d
velop any new or previously mined or aba
doned site for surface coal mining operatio
on lands on which such operations are reg
lated by a State unless such person has o
tained a permit from the State's regulato
authority." The regulations further provid
"(a) *Operations on lands on which such op*
ations are regulated by a State. (1) The
quirements of the initial regulatory progr
do not apply to surface mining and reclan
tion operations which occur on lands wit
a State which does not regulate any part
such operations." 30 CFR 710.11(a)(1).
addition, 30 CFR 715.11(a) states: "(a) *C*
pliance. All surface coal mining and recla
tion operations conducted on lands where
element of the operations is regulated b
State shall comply with the initial perfo
ance standards of this Part according to
time schedule specified in § 710.11."

[6] KRS 350.060(10); KAR 405.1-040.

formance standards in Kentucky on such sites.

[2] Appellant also contends that the disturbance in Kentucky should be treated separately from the surface coal mining operation in Virginia and that OSM is without authority to regulate the Kentucky disturbance because it affects less than 2 acres. It argues that for that reason the Kentucky activity falls within the 2-acre exemption of the Act.[7]

The 2-acre exemption is set forth in 30 CFR 700.11 as follows:

> This Chapter applies to all coal exploration and surface coal mining and reclamation operations, except—
>
> * * * * *
>
> (b) The extraction of coal for commercial purposes where the surface coal mining and reclamation operation affects two acres or less, *but not any such operation conducted by a person who affects or intends to affect more than two acres at physically related sites* * * *. [Italics added.]

The exemption has no applicability to appellant's situation. The Kentucky disturbance was under 2 acres, but it was physically related to the Virginia operation.[8] It provided the only access to the 13th seam on the Virginia permit. The activity in Kentucky was performed by Park, the same company that was mining the Virginia permit. The Kentucky disturbance was not a discrete surface coal mining operation, but was undertaken in furtherance of the Virginia operation. OSM has jurisdiction over the Kentucky disturbance.

OSM presented evidence to establish a prima facie case for violation 2 and 3 of the notice and the Administrative Law Judge found that those two violations were sustained by the evidence. Appellant did not challenge the fact of these violations on appeal.

For the reasons stated above, that part of the decision appealed from is affirmed.

Will A. Irwin
Chief Administrative Judge

Newton Frishberg
Administrative Judge

ADMINISTRATIVE JUDGE MIRKIN DISSENTING:

The majority view is not without adequate foundation in the history of the Act. Congress found that surface disturbances from coal mining are national as well as local problems. 30 U.S.C. § 1201(c), (e), (j) (Supp. II 1978). One of the purposes of the Act was to establish a national program to protect the environment, 30 U.S.C. § 1202(a) (Supp. II 1978), and to "exercise the full reach of Federal constitutional powers to insure the protection of the public interest." 30 U.S.C. § 1202(m) (Supp. II 1978). 30 CFR 700.11 and its statutory analogue, 30 U.S.C. § 1278(2)

---

[7] Sec. 528(2) of the Act, 30 U.S.C. § 1278(2) (Supp. II 1978), states: "The provisions of this chapter shall not apply to any of the following activities: * * * (2) the extraction of coal for commercial purposes where the surface mining operation affects two acres or less."

[8] The regulatory exemption makes no distinction for physically related sites separated by a state boundary line.

(Supp. II 1978), provide for an exemption for those who mine less than 2 acres. Exemptions are to be strictly construed. *Parrack* v. *Ford*, 68 Ariz. 205, 203 P.2d 872 (1949); *see Daniel Brothers Coal Co.*, 2 IBSMA 45, 87 I.D. 138 (1980). Moreover, the analysis of this exemption section of the Act by the Senate Committee on Interior and Insular Affairs, pending its enactment, was that it was for situations where mining would affect 2 acres or less because regulation of such a small operation would place too heavy a "burden on both the miner and the regulatory authority." S. Rep. No. 28, 94th Cong., 1st Sess. 223 (1975). Here, no undue burden is placed on either because the adjoining 700 acres is being regulated anyway. Nevertheless, I believe the Board should hold that the exemption applies.

While finding that surface mining is a national concern, Congress also found that the individual states were primarily responsible for regulating coal mining operations. 30 U.S.C. § 1201(f) (Supp. II 1978). That being so, I envision no environmental evil of sufficient magnitude to require OSM to cross state borders to establish the regulability of those situations where an operation of less than 2 acres being mined in one state is exempt from Federal regulations solely because of the intervening border, and not because of any actual separation of the operation from the larger, regulated one on the other side of the border. This is not to say that the smaller operation is not regulable by some other agency, state or Federal, but if a state is willing to serve as a 2-acre dumping ground for debris from a mining operation in another state, that peculiar manifestation of local pride or state sovereignty should not be of overriding concern to OSM—at least until such time as the Secretary, in terms, informs us that the border is not to provide a sanctuary.

I dissent

Melvin J. Mirkin
Administrative Judge

RENFRO CONSTRUCTION CO., INC.

2 IBSMA 372

Decided *November 26, 1980*

Appeal by Renfro Construction Co., Inc., from the Apr. 22, 1980, decision of Administrative Law Judge David Torbett, Docket No. NX 0–43–R, upholding Notice of Violation No. 79–II–59–14, issued for appellant's alleged failure to comply with revegetation requirements set forth in 30 CFR 715.20.

Affirmed as modified.

1. Surface Mining Control and Reclamation Act of 1977: Notice of Violation: Specificity

A notice of violation is reasonably specific, in accordance with 30 U.S.C. § 1271 (a)(5) (Supp. II 1978), when it is sufficient to guide the review and abatement processes without actual prejudice to the

recipient as the result of any ambiguity in the notice.

2. Surface Mining Control and Reclamation Act of 1977: Revegetation: Generally

A violation of 30 CFR 715.20(c) is proven when it is demonstrated that the temporary cover of small grains, grasses, or legumes seeded by an operator is inadequate to control erosion until a permanent cover is established, and that the operator has failed to take other measures to control erosion from the disturbed area.

APPEARANCES: David O. Smith, Esq., Corbin, Kentucky, for Renfro Construction Co., Inc.; Carol S. Nickle, Esq., Office of the Field Solicitor, Knoxville, Tennessee, Marianne O'Brien, Esq., and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Division of Surface Mining, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

Renfro Construction Co., Inc. (Renfro), has appealed from the Apr. 22, 1980, decision of the Hearings Division upholding Notice of Violation (NOV) No. 79–II–59–14. The Office of Surface Mining Reclamation and Enforcement (OSM), acting pursuant to the Surface Mining Control and Reclamation Act of 1977 (Act),[1] initially issued the NOV to Renfro for it's alleged failure to comply with 30 CFR 715.20 (a)(1). OSM subsequently modified the NOV to indicate that the provisions of the regulations violated by Renfro included 30 CFR 715.20 (c) and (d), and to require additional remedial action. In proceedings before the Hearings Division the NOV, so modified, was upheld. We affirm only the violation of 30 CFR 715.20(c) alleged by OSM.

Factual and Procedural Background

Renfro has conducted a surface coal mining and reclamation operation in Whitley County, Kentucky, under permit 7131–77. The coal extraction phase of this operation was completed during August 1979, and at the end of that month the company backfilled and seeded approximately 53 acres of disturbed area. Among the seeds planted were small grains, used in lieu of mulch to control erosion pending the development of a permanent vegetative cover. This action was taken by Renfro pursuant to its mining permit (Exh. R–18).

On Nov. 27, 1979, an authorized representative of OSM inspected Renfro's operation and issued NOV No. 79–II–59–14 (Exh. R–4), pursuant to sec. 521(a)(3) of the Act, 30 U.S.C. § 1271(a)(3) (Supp. II 1978). Renfro was charged with a "[f]ailure to establish on all disturbed areas a diverse, effective, and permanent cover of species native to the disturbed area," in violation of 30 CFR 715.20(a)(1).

---

[1] Act of Aug. 3, 1977, 91 Stat. 445, 30 U.S.C. §§ 1201–1328 (Supp. II 1978).

The NOV applied to "[t]hat portion of the disturbed area where bare spots exist,"[2] and Renfro was required to "[c]onduct a soil analysis on bare areas and [to] apply agricultural limestone in amounts specified by the analysis" by Dec. 18, 1979.

A follow-up inspection was conducted on Dec. 12, 1979. At this time the NOV was modified "to include [reference to] those areas on the more severe slopes where vegetation [had] failed to check erosion,"[3] and to require Renfro to perform further soil analysis; to apply lime and fertilizer as indicated by that analysis; and to seed and mulch (in the amount of 3,000 pounds per acre) "those areas not covered with effective vegetation to establish a diverse, effective, and permanent vegetative cover of species native to the area" (Exh. R–14). The company was allowed until Mar. 13, 1980, to complete this action.[4]

The NOV was further modified on Feb. 15, 1980, to clarify that the provisions of the initial program regulations violated by Renfro included 30 CFR 715.20(c) and (d) (Exh. R–15). The reference to 30 CFR 715.20(a)(1) in the NOV was not deleted by this action.

On Mar. 17 1980, OSM modified the NOV (Exh. R–16) to eliminate the mulching requirement specified in the modification of Dec. 12, 1979; however, the violation of 30 CFR 715.20(d) (related to mulching) specified in the modification of Feb. 15, 1980, was not vacated. Also on Mar. 17, OSM terminated the NOV because the required remedial action had been taken (Exh. R–17).

Renfro initially applied to the Hearings Division for review of the NOV on Dec. 5, 1979. Subsequently, Renfro filed three amended applications.[5] A review hearing was conducted on Mar. 27, 1980, after which the Administrative Law Judge upheld the NOV, as modified, in a ruling from the bench confirmed in writing on Apr. 22, 1980.[6] Renfro filed its notice of appeal from this decision on Apr. 28, 1980. Both parties filed briefs.

---

[2] These areas are shown in photographs introduced as Exhs. R–1, R–2, R–3, R–5, R–6, R–9, R–10, R–11, R–12, and R–13 (Tr. 12, 15–16).

[3] These areas are shown in photographs introduced as Exhs. R–7 and R–8 (Tr. 15–16).

[4] The issuing inspector explained at the review hearing that he thought it was to the advantage of Renfro for him to modify the original NOV rather than to terminate that and issue a new NOV to effect the purpose of the modification, and that 90 days were provided for the remedial action to be taken in order to allow Renfro to complete seeding after the winter months (Tr. 17).

[5] In its initial application and its first two amended applications, Renfro set forth claims related to the actions taken by the company to revegetate the area disturbed by its mining operation, the degree of success of its revegetation efforts, and the approval by the state regulatory authority of a variance from the mulching requirement set forth in 30 CFR 715.20(d). In its third amended application Renfro further claimed that the NOV was invalid because OSM had failed to comply with the requirements of 30 U.S.C. § 1271(a) (Supp. II 1978), and because OSM had issued a modification of the NOV (on Feb. 5, 1980) approximately 90 days after the original issuance of the NOV.

[6] A motion for summary decision based on the timing of OSM's answer to the original application for review was denied on Jan. 21, 1980. At the review hearing the Administrative Law Judge commented that his ruling had been based on a lack of showing of prejudice to Renfro by the timing of OSM's answer (Tr. 8). A second motion for summary decision, filed by Renfro on Mar. 18, 1980, was denied by the Administrative Law Judge by an oral ruling at the review hearing, on the grounds that there were material issues of fact unresolved by the pleadings (Tr. 8–9).

Discussion and Conclusion

Renfro first argues that OSM violated the requirement of sec. 521(a)(5) that a notice of violation shall "set forth with reasonable specificity the nature of the violation and the remedial action required, the period of time established for abatement, and a reasonable description of the portion of the surface coal mining and reclamation operation to which the notice * * * applies." 30 U.S.C. § 1271(a)(5) (Supp. II 1978). We do not agree. Although the NOV before us is not a model for the way NOV's should be written, it does not violate the statutory prescription.

[1] The basic purposes of an NOV are to inform the recipient of the nature and extent of circumstances at a surface coal mining and reclamation operation found to be in violation of OSM's regulatory standards, and to require certain action to eliminate those circumstances. The first purpose is served when the terms of the notice are sufficiently particular to guide the review process,[7] at least to the extent of informing the recipient sufficiently to facilitate (1) a reasoned determination whether the allegation should be contested and, if so, (2) preparation for such action.[8] When a course of abatement action is prescribed in terms clearly related to an alleged violation, the second purpose is served.[9] The greater OSM's precision in its composition of an NOV, the more likely it is that these criteria will be met; however, arguable ambiguities in the contents of an otherwise proper NOV do not invalidate OSM's enforcement action in the absence of a showing of actual prejudice to the recipient as a result of such ambiguities.[10]

In the record before us there is no evidence of such prejudice to Renfro attributable to the NOV under review. It appears that Renfro approached the review hearing fully prepared to defend its revegetation efforts and the results of those as being in accordance with the provisions of 30 CFR 715.20 referenced in the NOV, and OSM did not seek to introduce any evidence in support of a violation not described in the NOV. Furthermore, it is evident from OSM's termination of the NOV that the remedial requirements therein were comprehensible to Renfro.[11] Under these circumstances we conclude that the contents of the NOV were in accordance with sec. 521(a)(5) of the Act.

---

[7] *See, e.g., National Realty & Construction Co.* v. *OSHRC*, 489 F. 2d 1257, 1264 (D.C. Cir. 1973).

[8] *See Hardly Able Coal Co.*, 2 IBSMA, 332, 87 I.D. 557 (1980).

[9] Because the failure to abate an alleged violation may be the basis for further enforcement action by OSM, pursuant to 30 CFR 722.13, it is essential that the remedial action required by OSM be clearly communicated.

[10] *Compare Island Creek Coal Co.*, 2 IBSMA 125, 87 I.D. 304 (1980), *with Old Ben Coal Co.*, 2 IBSMA 38, 87 I.D. 119 (1980).

[11] OSM indicated its basis for termination of the NOV to be that "corrective measures have been taken" (Exh. R-17).

[2] We agree with the Administrative Law Judge that OSM proved a violation of the provisions of 30 CFR 715.20. Our affirmance of the decision below is premised, however, on the particular characterization of that violation which follows.

By its evidence OSM established that the vegetative cover resulting from Renfro's seeding operation in August 1979 was inadequate to control erosion in all of the permit area.[12] Under 30 CFR 715.20(c) it is required that disturbed areas must "be seeded with a temporary cover of small grains, grasses, or legumes *to control erosion until an adequate permanent cover is established.*" (Italics added.) Renfro need not have relied exclusively on vegetation for this purpose,[13] but having done so the company assumed the risk that its revegetation efforts might be inadequate to avoid significant erosion. The record evidence demonstrates that this eventuality was realized; thus a violation of 30 CFR 715.20(c) was proven.

OSM also referred to 30 CFR 715.20(a)(1) in its description of the alleged violation. In that subsection it is required that "[t]he permittee shall establish on all land that has been disturbed, a diverse, effective, and permanent vegetative cover of species native to the area of disturbed land or species that will support the planned postmining uses of the land approved." The inspector who issued the NOV testified at the review hearing to the effect that the time between Renfro's initial seeding of its disturbed area and his inspections of that area was inadequate for a permanent vegetative cover to have become established.[14] This testimony was not contradicted by other evidence; therefore, we do not consider 30 CFR 715.20(a)(1) to be an element of the violation proven by OSM.

For the foregoing reasons the decision below is modified, to delete 30 CFR 715.20(a)(1) and (d) as elements of the description of the violation in Notice of Violation No. 79–II–59–14, and affirmed.

MELVIN J. MIRKIN
Administrative Judge

NEWTON FRISHBERG
Administrative Judge

WILL A. IRWIN
Chief Administrative Judge

---

[12] Tr. 11–12, 15–17, 114; Exhs. R–1, R–2, R–5, R–6, R–7, R–8, R–9, and R–11 (photographs of the disturbed area taken during OSM's inspections).

[13] As a general rule mulch must be used, in addition to temporary species, to control erosion. 30 CFR 715.20(d). Renfro was granted a variance from this obligation by the regulatory authority (Exh. R–18). Because of this variance, subsec. 715.20(d) is not an element of the violation affirmed by our decision. We note, however, that the variance was conditioned as follows: "If the small grains do not provide adequate stability for the soil, an appropriate mulch is to be used." Moreover, even apart from this condition, the variance granted Renfro could not serve to relieve the company of its performance obligation under 30 CFR 715.20(c) to control erosion in the disturbed area.

[14] Tr. 21.

MARIETTA COAL CO.

2 IBSMA 382

Decided *November 26, 1980*

Appeal by the Office of Surface Mining Reclamation and Enforcement from the Mar. 21, 1980, decision of Chief Administrative Law Judge L. K. Luoma, Docket No. IN 0–12–R, vacating Notice of Violation No. 80–3–17–3 which was issued to Marietta Coal Co. for conducting surface coal mining operations within 100 feet of a cemetery, in violation of sec. 522(e)(5) of the Surface Mining Control and Reclamation Act of 1977.

Reversed.

1. Surface Mining Control and Reclamation Act of 1977: Evidence: Generally

A prima facie case for the existence of a human burial ground can be established by evidence that stones at the purported site of the burial ground bear inscriptions generally associated with gravemarkers, combined with evidence that the site is described as a "cemetery" in a coal lease pertinent to land that includes the site.

2. Surface Mining Control and Reclamation Act of 1977: Words and Phrases

"*Cemetery.*" The term cemetery as it is used in sec. 522(e)(5) of the Act, 30 U.S.C. § 1272(e)(5) (Supp. II 1978), may include a private burial ground.

APPEARANCES: John C. McDowell, Esq., Field Solicitor, and Myra P. Spicker, Esq., Office of the Field Solicitor, Indianapolis, Indiana, and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement; Neal S. Tostenson, Esq., Cambridge, Ohio, for Marietta Coal Co.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

This appeal was brought by the Office of Surface Mining Reclamation and Enforcement (OSM) from the Mar. 21, 1980, decision of the Hearings Division vacating Notice of Violation (NOV) No. 80–3–17–3. The NOV was issued to Marietta Coal Co. (Marietta) as the result of OSM's determination that the company was conducting surface coal mining operations within 100 feet of a cemetery, in violation of sec. 522(e)(5) of the Surface Mining Control and Reclamation Act of 1977 (Act).[1]

---

[1] Act. of Aug. 3, 1977, 91 Stat. 445, 507, 30 U.S.C. § 1272(e)(5) (Supp. II 1978). Sec. 522(e)(5) provides:

"(e) After the enactment of this Act and subject to valid existing rights no surface coal mining operations except those which exist on the date of enactment of this Act shall be permitted—

* * * * *

"(5) within * * * one hundred feet of a cemetery."

There has been no assertion by Marietta that the subject surface coal mining operation was in existence on the date of enactment of the Act or that the company enjoys any "valid existing rights" with respect to its operation.

Factual and Procedural Background

Marietta conducts a surface coal mining and reclamation operation in Belmont County, Ohio, under Ohio Permit No. C–1102, on land owned by Nancy Phillips. The lease between Marietta and Phillips contains the provision: "Lessee will not disturb the existing cemetery consisting of three or four graves on said property. Lessee shall construct a wire fence around the cemetery during mining operations" (Exh. 6).[2]

On Jan. 8, 1980, an OSM inspector visited Marietta's operation for a routine inspection. On the site he observed a fenced area within which there were four prominent stones. Three stones were roughly in alignment, approximately 6 feet apart. On one of the three were discernible the letters "A.D." followed by the number "1815." On another there appeared to be the letters "N.D.," "A," and the number "07" possibly preceded by an "8." Mining activity was being conducted within 100 feet of these stones along a highwall.

The OSM inspector returned to Marietta's operation on Jan. 9, 1980, and issued Notice of Violation No. 80–3–17–3. A single violation was described: "Operator has affected area within 100′ of a cemetery" (Exh. 7). Marietta sought review of the NOV and a hearing was held on Feb. 29, 1980. Testimony during the hearing established the circumstances of OSM's inspection, related above, and otherwise was focused on the factual issue whether the fenced area is a human burial ground. In this regard, the Chief Administrative Law Judge found from the testimony:

> The owner of the land had been told by her father that bodies were buried in a certain portion of the field. As a result her father never plowed that portion of the field and out of deference to her father's wishes she never allowed that portion of the field to be disturbed. * * *
>
> In accordance with the lease, applicant erected a fence around the area in question. The property deed which was attached to the lease [Exh. 6] contained no reservation or mention of any reservation of any ground for cemetery purposes. There were no records in the township registry of a cemetery on the property. The property has not been set off except for the fence placed by [Marietta] and there were no indications that there had been any maintenance of the stones or the property around them.
>
> * * * * *
>
> Although there is no [direct] proof that bodies are buried in the area in question, based upon the assertions of the owner of the land, I find that the area is a private burial site.

Decision at 3–4. After relating his findings, the Chief Administrative Law Judge concluded that "the site is not a cemetery as contemplated by the Act." *Id.* at 4. Accordingly, the NOV was vacated.

Discussion and Conclusions

[1] The record evidence supports the determination that the fenced area within Marietta's operation is

---

[2] All exhibits referenced in this opinion were introduced by OSM.

a private burial ground. OSM's testimony and photographic evidence concerning the spatial relationship between certain stones on the site (Tr. 18; Exhs. 1 and 2) and the inscriptions found on two of those stones (Tr. 17–18, 30–32; Exh. 3), combined with the reference to the area as a "cemetery" in the lease between Marietta and the landowner (Exh. 6), established a prima facie case of the existence of a burial ground.[3] Marietta's evidence that the stones might be foundation stones rather than gravemarkers (Tr. 92–93), that the site is not identified as a burial ground in local public records (Tr. 74–75), and that there is no explicit reference to a burial ground in the last recorded conveyance of title to the property (Exh. 6) merely suggests a different conclusion. It is not sufficient to overcome OSM's prima facie case.[4]

From the evidence as a whole, the stones described by OSM appear more likely than not to be gravemarkers. The fact that one witness had not found reference to a cemetery on the property in local, public records is not dispositive of whether a burial ground exists there, particularly because the same witness testified (Tr. 65) that not all cemeteries in Belmont County, Ohio, are identified in county records. Nor is the fact that there is not explicit reference to a burial ground in the latest deed conclusive evidence that such does not exist on the property. The lack of reservation of an easement related to a burial ground in the last conveyance of title to the property does not preclude the existence of a burial ground there.

[2] From our conclusion that a human burial ground is located within the area of Marietta's surface coal mining and reclamation operation, it follows that this site is a "cemetery" within the meaning of sec. 522(e)(5) of the Act. Although the departmental definition of "cemetery" to mean "any area of land where human bodies are interred," 30 CFR 761.5, was not applicable at the time of the violation,[5] the meaning associated with the term "cemetery" under state law, generally,[6] and Ohio law, particularly,[7] is consistent with the use of the same or similar definition in this case. Such a definition may fairly be said to embrace a private burial ground, including one in

---

[3] A prima facie case is made when sufficient evidence is presented to establish essential facts which, if uncontradicted, will permit if not compel a finding. *Burgess Mining and Construction Corp.*, 1 IBSMA 293, 298–99, 86 I.D. 656, 658–59 (1979); *James Moore*, 1 IBSMA 216, 223, 86 I.D. 369, 373 (1979).

[4] The ultimate burden of persuasion in a proceeding to review a notice of violation issued pursuant to sec. 521(a)(3) of the Act, 30 U.S.C. § 1271(a)(3) (Supp. II 1978), lies with the applicant for review. 43 CFR 4.1171.

[5] This definition did not become applicable to the initial regulatory program until Jan. 30, 1980 (44 FR 77440, Dec. 31, 1979), which was after OSM's issuance of the NOV to Marietta (Exh. 7).

[6] *See* 75 A.L.R. 2d 591–2 (1961) (and cases cited therein); 14 C.J.S. *Cemeteries* § 1 (1980) (and cases cited therein).

[7] *See, e.g.*, Ohio Rev. Code Ann. § 1721.21 (A)(2)(a) (Page).

which burials have not occurred for an extensive period of time.[8]

For the foregoing reasons, the decision below vacating Notice of Violation No. 80-3-17-3 is reversed.

MELVIN J. MIRKIN
Administrative Judge

WILL A. IRWIN
Chief Administrative Judge

ADMINISTRATIVE JUDGE FRISHBERG DISSENTING:

I would affirm the decision below. As stated by Judge Luoma:

> The site has not been used since the early nineteenth century and has not been maintained. In effect, the site has not been "set apart" either by a municipal authority or by any sort of private enterprise. No one visits the site and no future intermemts [*sic*] are planned there. The area has never been designated by deed reservation nor had there been any other act of conveyance to a public authority, or a cemetery association, to show that there was ever any intent to create a cemetery.

(Decision at 4). Not only does no one visit the site, but apparently no one has survived or knows of anyone who might have been buried there. When the lease with Marietta was executed, lessor had, and still has, the right to remove the stones and disinter whatever remains might still exist.

Thus, even if the four stones evidenced a private burial ground in the past, it has long since been abandoned in fact.[1] While abandonment usually requires overt evidence, such as the disinterment of bodies and the removal of gravemarkers, it is ultimately a question of intent.[2] Regarding a private burial ground, it is the intent of the heirs or survivors of those creating the burial ground or those buried therein which controls.[3] Since none apparently exist, there is no one who has standing to enjoin the removal of the stones and remains, if any, by lessor, if she chooses to do so.[4] Accordingly, the burial ground has been abandoned.

By adhering to her father's wishes and agreeing to her wishes, lessor and Marietta, respectively, made a voluntary decision to forfeit gain. To penalize them further under the circumstances lends credence to the old saw, "no good deed goes unpunished." I do not believe Congress intended "cemetery" to be so interpreted.

NEWTON FRISHBERG
Administrative Judge

---

[8] This is not to say that any casual or surreptitious deposit of a human body will constitute a cemetery; nor do we say that cemeteries cannot be abandoned. We do say that no such exception has been shown here.

[1] *See* cases collected at 14 Am. Jur. 2d, *Cemeteries* § 21 and Annot.; 75 A.L.R.2d 591, 598-99 (1961).

[2] *Id.*

[3] *See Heiligman* v. *Chambers*, 338 P.2d 144 (Okla. 1959).

[4] That lessor's father was concerned lest the dead, if any, be disturbed would not give him standing. *See Heiligman* v. *Chambers*, *supra*, n.3

U. S. GOVERNMENT PRINTING OFFICE : 1981 O - 334-201 : QL 3

CLARIFICATION OF AUTHORITIES AND RESPONSIBILITIES FOR IDENTIFYING AND PROTECTING CULTURAL RESOURCES ON THE OUTER CONTINENTAL SHELF*

M-36928 *November 24, 1980*

Outer Continental Shelf Lands Act: Generally

Apart from control over authorizations to exploit the mineral resources of the OCS, the Department has no authority to regulate activities affecting mineral resources on the OCS.

National Historic Preservation Act: Generally

Sec. 106 of the National Historic Preservation Act places a duty upon the Department to insure that issuance of authorizations on the OCS will not affect significant cultural resources without providing the Advisory Council on Historic Preservation the opportunity to comment. A rule of reason applies to the extent of the OCS lands to be studied and the degree of effort required.

National Historic Preservation Act: Generally

Archival research is first required to determine whether significant cultural resources may be affected by activities on an OCS lease or right-of-way.

National Historic Preservation Act: Generally

Cultural resource surveys should only be undertaken when the results of archival research indicate the likelihood that a significant cultural resource will be affected by the undertaking and that the resource is capable of being detected at a reasonable cost and effort.

National Historic Preservation Act: Generally

When cultural resources are identified on the OCS, it is appropriate to consider them for nomination to the National Register of Historic Places.

National Historic Preservation Act: Generally

Sec. 106 of the National Historic Preservation Act authorizes the Department to require either by regulation or by stipulation in an OCS lease or right-of-way that the lessee or holder make cultural resource studies where evidence indicates that such resources may be affected by operations, and that information discovered be made available to the Department.

Outer Continental Shelf Lands Act: Generally—National Historic Preservation Act: Generally—National Environmental Policy Act of 1969: Generally

The National Historic Preservation Act, Outer Continental Shelf Lands Act and National Environmental Policy Act authorize a stipulation which provides that a cultural resource included on or eligible for inclusion on the National Register which is discovered by an OCS lessee as a result of lease operations and which is salvaged, be made reasonably available to recognized scientific or educational institutions for study.

National Historic Preservation Act: Generally

The Outer Continental Shelf is not within the jurisdiction of a State Historic Preservation Office (SHPO). However, as a matter of comity, the recommendations of a SHPO as to OCS cultural resources should be carefully considered.

---

*Not in chronological order.

To: Director, Bureau of Land Management Director, Geological Survey
From: Solicitor
Subject: Clarification of Authorities and Responsibilities for Identifying and Protecting Cultural Resources on the Outer Continental Shelf

This memorandum is in response to your joint request dated May 2, 1980, for an option clarifying the authorities and responsibilities of your agencies for identifying and protecting cultural resources on the Outer Continental Shelf (OCS).

I. The Responsibilities of BLM and the USGS Toward Cultural Resources on the OCS are Limited to Impacts of Mineral Activities

Recent case law has demonstrated that apart from control over authorizations to exploit the mineral resources of the OCS, the Department has no authority to regulate activities affecting cultural resources on the OCS. In *Treasure Salvors* v. *Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F. 2d 330 (5th Cir. 1978), the court of appeals held that the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1331 *et seq.*, extended the sovereignty of the United States to exploitation of the mineral resources of the OCS, but not for other purposes. This limited construction is consistent with Article 2 of the Convention on the Continental Shelf.[1] *See United States* v. *Ray*, 423 F. 2d 16 (5th Ci 1970). Article 2 reads in part a follows:

> The Coastal state [nation] exercises ove the continental shelf sovereign rights fo the purpose of exploring it and exploit ing its natural resources.[2]

The court noted that interpreta tions of the Convention by lega scholars reached similar conclusion over the nature of control of coastal nation over its continenta shelf and quoted the following com ments of the International La Commission:

> [The Commission] was unwilling to ac cept the sovereignty of the coastal Stat over the seabed and subsoil of the con tinental shelf. * * * [T]he text as no adopted leaves no doubt that the right conferred upon the coastal state cover a rights necessary for and connected wit the exploration and exploitation of th natural resources of the continental shel
>
> * * * * *
>
> It is clearly understood that the righ in question do not cover objects such a wrecked ships and their cargoes (includ ing bullion) lying on the seabed or co ered by the sand of the subsoil. 11 U.S GAOR, Supp. 9 at 42, U.N. Doc. A/315 (1956) (footnotes omitted), cited in 56 F. 2d at 340.

Accordingly, the court conclude that the United States did not hav control over the wreck in questio Similarly, in *United States* v *Alexander*, 602 F. 2d 1228 (5th Ci 1979), the court of appeals hel that OCSLA did not give th Secretary of the Interior authorit to promulgate conservation measures regulating activities on the OCS having nothing to do with mineral leases. There the court struck down a conviction for damaging a coral reef where the defendant was conducting salvage operations on a sunken wreck.

---

[1] Convention on the Continental Shelf, *done* Apr. 29, 1958, [1964] 15 U.S.T. 471, T.I.A.S. No. 5578, in force June 10, 1964.

[2] Natural resources are defined in Article as "the mineral and other non-living resourc of seabed and subsoil together with livi organisms belonging to sedentary species."

These cases establish that the Department lacks the power to protect the cultural resources of the OCS by regulation of private individuals apart from any involvement with mineral activities authorized by OCSLA. Accordingly, no regulatory program for long term protection of cultural resources on the OCS can be established independent from activities necessary to insure that mineral activities do not damage these resources.[3]

In this regard, we have examined the cultural resource responsibilities of BLM and USGS set forth, in the Departmental Manual, 655 D.M. 1 (Sept. 29, 1980), and have examined the current regulations appearing at 43 CFR Part 3300 and 30 CFR Part 250. Since the responsibilities created by the manual and regulations arise out of the regulation of mineral resources on the OCS, they are a proper exercise of Secretarial authority. We do not believe that there is any legal requirement to expand them further.

II. The Requirements of Section 106 of the National Historic Preservation Act Apply to Issuance of Mineral Leases and Pipeline Rights-of-Way on the OCS.

Your memorandum specifically raises the question of the applicability of the National Historic Preservation Act (NHPA), 16 U.S.C. § 470 *et seq.* (1976), to activities conducted by your agencies on the OCS.

Sec. 106 on NHPA reads as follows:

> The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and *the head of any Federal department* or independent agency *having authority to license any undertaking shall*, prior to the approval of the expenditure of any Federal funds on the undertaking or *prior to the issuance of any license*, as the case may be, *take into account the effect of the undertaking* on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under sections 470i to 470m of this title a reasonable opportunity to

---

[3] However, we are of the view that the Secretary may establish programs that assist in the preservation of cultural or natural resources on the OCS where authorized to do so and where the program does not involve the regulation of private activities apart from mineral development. For example, the Secretary is authorized to list OCS properties on the National Register of Historic Places pursuant to the National Historical Preservation Act of 1966, 16 U.S.C. 470 *et seq.* (1976), and is authorized to designate National Historic and National Natural Landmarks on the OCS pursuant to the Historic Sites Act of 1935, 16 U.S.C. 461 (1976). These programs place no restraints on private activities but only require planning considerations on the part of federal agencies when taking actions which may affect designated sites.

> comment with regard to such undertaking. 16 U.S.C. § 470f (1976) (Italics added).

The Secretary of the Interior is clearly the head of a federal department having authority to issue OCS leases or rights-of-way, and issuance of an oil and gas lease or pipeline right-of-way on the OCS clearly fits the definition of "undertaking" as defined by the Advisory Council on Historic Preservation:

> "Undertaking" means any Federal, federally assisted or federally licensed action, activity, or program or the approval, sanction, assistance, or support of any non-federal action, activity, or program. 36 CFR 800.2(c) (1979).

Furthermore, it is the position of this Department that a cultural resource on the OCS may be "included in or eligible for inclusion in the National Register" because there is no provision in NHPA limiting its applicability to the proprietary or territorial jurisdiction of the United States. Section 101 (a) of NHPA states that the Secretary of the Interior is authorized to include on the National Register any site or object which is significant in American history, architecture, archeology, and culture. 16 U.S.C. § 470a(a) (1976).

Therefore, sec. 106 of NHPA places a duty upon the Department to insure that issuance of authorizations on the OCS will not affect significant cultural resources without providing the Advisory Council the opportunity to comment. Since the Department's authority to issue leases or rights-of-way extends to the geographic limits of the OCS,
43 U.S.C.A. § 1331(a) (1980 Supp.
its duties under NHPA extend
those limits.[4]

Sec. 106 has been implemented b
the Advisory Council on Histor
Preservation through regulatio
which are binding on all feder
agencies in the absence of counter
part regulations promulgate
under 36 CFR 800.11. The regul
tions implementing sec. 106 require

> [E]ach Federal agency to identify o
> cause to be identified any National Reg
> ister or eligible property that is locate
> *within the area of the undertaking's po*
> *tential environmental impact and tha*
> *may be affected by the undertaking.* 3
> CFR 800.4(a) (1979) (Italics added).

This statement defines the are
within which the identification an
other requirements of sec. 106 mus
be met. *See* 36 CFR 800.4(a) an
(b). It is clear from the foregoin
that two conditions must exist be
fore sec. 106 duties apply: that th
National Register or eligible prop

---

[4] In addition to sec. 106 of NHPA, the Na
tional Environmental Policy Act, 42 U.S.C
§ 4321 *et seq.* (1976) (NEPA), imposes an ob
ligation upon the Department regarding cul
tural resources. Sec. 101(b) of NEPA pro
vides in part:

"[I]t is the continuing responsibility o
the Federal Government to use all practicabl
means, consistent with other essential con
siderations of national policy, to improve an
coordinate Federal Plans * * * to the en
that the Nation may * * * (4) Preserve im
portant historic, [and] cultural * * * as
pects of our national heritage." 42 U.S.C
§ 4331(b) (1976).

Regulations implementing NEPA issued by
the Council on Environmental Quality requir
discussion of the effects upon historic and
archeological resources in environmental im
pact statements (EIS's). 40 CFR 1502.16(g)
(1979). The regulations also require that to
"the fullest extent possible" EIS's be inte
grated with other required analyses including
those under NHPA. 40 CFR 1501.7(a)(6) and
1502.25(1979).

erty be within the area of the potential environmental impact *and* that it may be affected by the undertaking.

The question then becomes the extent of the area subject to sec. 106 procedures for the undertaking's potential environmental impact, defined as follows:

> "Area of the undertaking's potential environmental impact" means that geographic area within which *direct and indirect effects generated by the undertaking could reasonably be expected to occur.* 36 CFR 800.2(o) (1979) (Italics added).

Therefore, the "area of the undertaking's potential environmental impact," as defined, determines the extent of the OCS where sec. 106 responsibilities may arise. The regulations limit the effects to be studied to those which "could reasonably be expected to occur" as a result of the federal action. 36 CFR 800.2(o). Thus the regulations explicitly adopt a rule of reason, which requires that only reasonably foreseeable effects be studied for potential impact on cultural resources.

In the OCS context, we believe the rule of reason first requires archival research to determine whether significant known cultural resources may be affected by activities on a lease or right-of-way. This research includes an examination of the published lists of the National Register and eligible properties, available literature, public records, and advice from individuals or organizations with historical and cultural expertise, as appropriate, to determine whether historic and cultural properties are known or likely to exist that may be affected by OCS activities.

After completion of the research, further decisions as to the type of site-specific cultural resources surveys, if any, should be made. Generally, these surveys should be only undertaken when the results of archival research indicate the likelihood that a significant cultural resource will be affected by the undertaking and that the resource is capable of being detected at a reasonable cost and effort. For example, if research indicates that a significant shipwreck is likely to exist on a certain lease tract or adjacent lease tracts and that it can be detected, reasonable survey efforts to assure that mineral activities will not disturb the shipwreck should be undertaken.

Difficulty exists with anomalies which may indicate the presence of a cultural resource when further surveys or studies to determine their true character are prohibitively expensive. Under these circumstances, we believe that it would not exceed the Department's authority under OSCLA and that it would be consistent with its cultural resource responsibilities to include stipulations in a lease or right-of-way to insure avoidance of any adverse impact upon an anomaly. The identification and consultation requirements of sec. 106 are only triggered when the federally authorized activity will have an effect upon a cultural resource. *See* 16 U.S.C. § 470f (1976). Avoidance under these circumstances eliminates any effect and therefore the requirements.

Where anomalies which may be cultural resources are discovered through environmental or geological and geophysical studies of OCS tracts, either by the government or by lessees, further steps should be taken to identify them if they may be affected by operations on a lease or right-of-way. For example, cultural resources that no archival research could identify may be identified in other studies which are currently conducted on a site-specific basis for bottom-founded structures.

Finally, we feel that the rule of reason approach precludes a responsibility to physically survey lease tracts or rights-of-way for cultural resources not identified as described above. To carry out a detailed seabed survey on the premise that a cultural resource might exist, unsupported by clear historical or scientific evidence would in our opinion constitute an unjustifiable expenditure of time and resources. Conversely, if clear evidence is provided by historians, archeologists, or scientists to the effect that an historically important underwater site might suffer damage from drilling or other form of seabed exploitation, then the site should be subjected to a survey prior to the commencement of any activities that could adversely affect it or the resource should be avoided entirely.

In cases where eligible sites are identified, it should then be determined if proposed activities will affect the sites and whether that effect will be adverse. If there is no adverse effect expected, this finding should be forwarded to the Advisory Council for its concurrence. If adverse effects are expected, a report should be forwarded to the Advisory Council, for its comments. Depending on the response of the Advisory Council, treatment of the sites may be resolved by a Memorandum of Agreement with the Council staff or may require full consideration by the Advisory Council. In any event, once the Council comments have been reviewed and considered, the activities may proceed in accordance with any mitigation measures adopted. The procedures set forth in this paragraph summarize the applicable regulatory requirements found in 36 CFR Part 800 and which are to be followed in the process.

The rule of reason provides the agency decisionmaker with the opportunity to exercise judgment in complying with the NHPA and the regulations. In exercising this judgment, sensitivity to the significance of the cultural resource, possible adverse effects, mitigation options, costs to the Government or industry, and practical alternatives is required.

In accordance with NHPA, when significant cultural resources are identified, it is appropriate to consider them for nomination to the National Register of Historic Places. The shipwrecks *San Jose*, *H. L. Hunley*, *U.S.S. Peterhoff*, *U.S.S. Monitor*, and *U.S.S. Hatteras* are examples of cultural resources discovered offshore which are on, or have been identified as eligible for, the National Register. As described in Part I of this opinion, however, there is no authority over the OCS requiring identification of cultural resources apart from those affected by mineral activities. This limits the application of secs. 2 and 3 of Executive Order 11593 (May 13, 1971) to OCS cultural resources affected by mineral activities.

We recognize that the Advisory Council's regulations did not contemplate the kinds of problems associated with identification of cultural resources on the OCS. We also recognize the difficulties of outlining appropriate procedures in a legal opinion. For these reasons, we point out that the Advisory Council has invited all affected federal agencies to issue counterpart regulations more specifically defining the duties of an agency under sec. 106. 36 CFR 800.11. We strongly recommend that this procedure be followed as promptly as possible by USGS and BLM to reflect their respective responsibilities. It is through this process that we believe the rule of reason can most appropriately be defined.

III. *Authority to Require Collection of Cultural Resource Information*

You also ask whether the Department has the authority to require a lessee to collect information to identify cultural resources on the OCS throughout various stages of development. The Department has the authority to require, either by regulation or by stipulation in a lease or right-of-way, that the lessee or holder make cultural resource studies where evidence indicates that such resources may be affected by operations, and that pertinent information discovered during operations be made available to the Department. The authority is sec. 106 of NHPA which places a duty upon the Department to identify cultural resources so affected and to consider such information in authorizing development and production operations. However, the rule of reason applies. In an area where there is no information suggesting the existence of cultural resources or where a lessee chooses to avoid such resources, a requirement to conduct studies may be unreasonable. On the other hand, where historical or scientific data indicates the presence of resources that will be affected by operations, such studies can be required without being so restrictive as to effect a *pro tanto* cancellation of the lease or right-of-way. *See*

Union Oil Co. of California v. *Morton*, 512 F. 2d 743, 751 (9th Cir. 1975).

In some instances, it may be necessary to salvage certain cultural resources where impacts of exploration, development or production operations cannot be avoided. You have asked the question to whom do these resources belong under these circumstances.

The courts have made clear that the provisions of the Antiquities Act, 16 U.S.C. §§ 431–33 (1976), do not apply to objects located on the OCS. *See Treasure Salvors, supra*. There is, therefore, no statutory law as to how such cultural resources are to be handled when salvage is necessary. In determining title to property found upon the OCS, courts have applied the common law principle of the law of finds. *Treasure Salvors, supra*, at 336–337. Under this principle, title vests in "the first finder lawfully and fairly appropriating it and reducing it to possession, with the intention to become its owner." *Rickard* v. *Pringle*, 293 F. Supp. 981, 984 (E.D.N.Y. 1968). Absent an agreement to the contrary, resources salvaged by an oil or gas lessee would belong to that lessee. We believe, however, that authority exists under NHPA, NEPA and OSCLA to require a stipulation which provides that a cultural resource included on or eligible for inclusion on the National Register which is encountered or discovered by the lessee as a result of lease operations and which is salvaged, be made reasonably available to recognized scientific or educational institutions for study.

IV. *The Role of a State Historic Preservation Officer on the OCS*

Finally, the question has been independently raised of the role that a State Historic Preservation Officer (SHPO) plays regarding cultural resources on the OCS. A SHPO is defined as follows:

> "The State Historic Preservation Officer" means the official, who is responsible for administering the Act within the State or jurisdiction, or a designated representative authorized to act for the State Historic Preservation Officer. These officers are appointed pursuant to 36 CFR 61.2 by the Governors of the 50 States, Guam, American Samoa, the Commonwealth of Puerto Rico, the Virgin Islands, the Trust Territory of the Pacific Islands, the Commonwealth of the Mariana Islands, and the Mayor of the District of Columbia. 36 CFR 800.3(m).

A SHPO's responsibilities are defined, in part, as follows:

> The State Historic Preservation Officer should participate in the review process established by these regulations whenever it concerns an undertaking located within the State Historic Preservation Officer's jurisdiction. 36 CFR 800.5(a).

A problem arises in that the OCS is not within the jurisdiction of any state or other jurisdictional unit set forth above. As stated earlier, cultural resource regulations appearing at 36 CFR Part 800 did not contemplate problems involving the OCS. This is another example. Again, we feel that counterpart regulations are the appropriate tool to define more accurately the respective roles of the Department and SHPO's in the OCS context.

As interim advice, however, we feel that the SHPO should initially be consulted under 36 CFR 800.4(a)(1) to determine the information which may be available concerning OCS cultural resources within the area of a project's potential environmental impact. This is consistent with the duty to first attempt to identify cultural resources by archival research as set forth above. Consultation should then continue throughout the process provided in the Advisory Council's regulations. With respect to effects upon cultural resources, the regulations do not require that the recommendations of a SHPO must necessarily be followed. Nevertheless, as a matter of comity, the recommendations of a SHPO should be carefully considered.

We hope that this memorandum has provided you with guidance in this difficult area. If you have further questions do not hesitate to contact this office.

CLYDE O. MARTZ
Solicitor

ESTATE OF JESSE J. JAMES

8 IBIA 205

Decided *December 8, 1980*

Escheat determination concerning trust property on the public domain.

1. Indian Probate: Escheat

The Act of Nov. 24, 1942, 56 Stat. 1022 (25 U.S.C. § 373b (1976)) is not ambiguous. It plainly states that where, as here, a public domain allotment exceeding a value of $2,000 lies adjacent to an Indian community and may be advantageously used for Indian purposes, such allotment shall be held in trust by the United States for such Indians as Congress (not the Secretary of the Interior) may designate, where the owner of the allotment dies intestate without heirs eligible to inherit such allotment.

APPEARANCES: Craig J. Dorsay, Esq., Portland, Oregon, and Sande Schmidt, Esq., Burns, Oregon, for petitioner Burns-Paiute Tribe.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

INTERIOR BOARD OF INDIAN APPEALS

Jesse J. James, deceased Burns-Paiute, died intestate without heirs on Jan. 12, 1978, possessed of trust property located on the public domain. The estimated value of decedent's public domain allotment (Indian Joe Allotment No. 144–111) was $9,600 as of Mar. 27, 1979.

The Burns-Paiute Tribe, through counsel, seeks an order from the Board of Indian Appeals, on behalf of the Secretary of the Interior, declaring that decedent's trust property be held in trust by the United States for the benefit of the tribe by operation of escheat. According to the tribe, the Indian Joe allotment lies within the original boundaries of the Malheur Reservation and only 12 miles from present tribal land. The Burns-Paiute Tribe submits that acquisition of the Indian Joe allotment will enhance the economic status of the tribe which is land poor.

Congress enacted a statute in 1942 to govern situations such as the above. The Act of Nov. 24, 1942, 56 Stat. 1022, codified at 25 U.S.C. § 373b (1976), provides as follows:

> If an Indian found to have died intestate without heirs was the holder of a restricted allotment or homestead or interest therein on the public domain, the land or interest therein and all accumulated rents, issues, and profits therefrom shall escheat to the United States, subject to all valid existing agricultural, surface, and mineral leases and the rights of any person thereunder, and the land shall become part of the public domain subject to the payment of such creditors' claims as the Secretary of the Interior may find proper to be paid from the cash on hand or income accruing to said estate; *Provided*, That if the Secretary determines that the land involved lies within or adjacent to an Indian community and may be advantageously used for Indian purposes, the land or interest therein shall escheat to the United States to be held in trust for such needy Indians as the Secretary of the Interior may designate, where the value of the estate does not exceed $2,000, and in case of estates exceeding said sum, such estates shall be held in trust by the United States for such Indians as the Congress may on and after November 24, 1942 designate, subject to all valid existing agricultural, surface, and mineral leases and the rights of any person thereunder.

The tribe submits that the above statute is ambiguous. Accordingly, it seeks to prove by reference to the legislative history of the Act that the Secretary is vested with authority to decree that the public domain allotment in question escheat to the Burns-Paiute Tribe as the appropriate disposition of the land. Under traditional canons of interpretation, the legislative history of a statute is irrelevant if the statute is unambiguous. *United Air Lines* v. *McMann*, 434 U.S. 192, 199 (1977).

[1] The Board does not agree with the tribe that the Act of Nov. 24, 1942, is ambiguous. The statute plainly states that a public domain allotment, lying within or adjacent to an Indian community and which may be advantageously used for Indian purposes, shall be held in trust by the United States for such needy Indians as *the Secretary of the Interior* may designate, where the value of the estate does not exceed $2,000 and where the owner of the allotment dies intestate without heirs eligible to inherit such allotment. As pertinent to the case at bar, the statute provides that a public domain allotment exceeding the value of $2,000 lying within or adjacent to an Indian community and which may be advantageously used for Indian purposes shall be held in trust by the United States for such Indians as *Congress* may designate, if the owner of the allotment dies without heirs eligible to inherit such allotment. In short, under the factual circumstances of the case at hand, it is for Congress and not the Secretary to decide whether or not the Indian Joe allotment should escheat to the Burns-Paiute Tribe or other Indians.

Based on the record before the

Board, and following a full opportunity for individual Indians and Indian groups to state a claim to the property at issue, the Board has no reservation stating that were it within its authority to decree, it would allow the Indian Joe allotment to go to the Burns-Paiute Tribe, rather than reverting to the public domain or being conveyed to other Indians.

Pursuant to the authority delegated to the Board of Indian Appeals by 43 CFR 4.1, and in accordance with the provisions of 25 U.S.C. § 373b (1976) and 43 CFR 4.205(b), the Bureau of Indian Affairs is instructed to hold the estate of Jesse J. James in trust for such Indians as Congress may hereafter designate.

Wm. Philip Horton
Chief Administrative Judge

I concur:

Franklin Arness
Administrative Judge

NORTHWAY NATIVES, INC.

5 ANCAB 123

Decided *December 12, 1980*

Appeal from the Decision of the Alaska State Director, Bureau of Land Management F-14912-A and F-14912-B.

Dismissed in part; motion to intervene denied.

1. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Dismissal

Where one issue on appeal is that the Bureau of Land Management erred by excluding certain lands from conveyance without adjudicating the status of such lands, and the appellant and the Bureau of Land Management stipulate to withdrawal of the appeal on condition that the Bureau of Land Management will later adjudicate the status of such lands, then the issue is resolved and the Board will order partial dismissal of the appeal as to that issue.

2. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Intervention

Intervention in proceedings before the Alaska Native Claims Appeal Board is in the discretion of the Board. 43 CFR 4.909(b).

3. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Intervention

The Board will not allow intervention following resolution of the issues on appeal.

4. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Intervention

The Board will not allow introduction of new issues to an appeal by an intervenor.

APPEARANCES: Peter J. Aschenbrenner, Esq., Aschenbrenner and Savell, and David Wolf, Esq., Keane, Harper, Pearlman and Copeland, for appellant; Elizabeth S. Ingraham, Esq., for Doyon, Limited; M. Francis Neville, Esq., Office of the Regional Solicitor, for Bureau of Land Management; Shelley J. Higgins, Esq., and Martha T. Mills, Esq., Department of

Law, for State of Alaska; Thomas B. Jones, Esq., U.S. Army Corps of Engineers, Agent to U.S. Air Force.

OPINION BY ALASKA NATIVE CLAIMS APPEAL BOARD

Summary of Appeal

Northway Natives, Inc., appealed the Bureau of Land Management Decision to Issue Conveyance of their land selected under ANCSA. One issue was that the Bureau of Land Management erred by excluding certain lands, PLO 5164, from conveyance without adjudicating the status of such lands.

The Bureau of Land Management and Northway Natives, Inc., stipulated to an agreement that the Bureau of Land Management will issue a decision adjudicating the status of the PLO 5164 selection at a later date. Northway Natives, Inc., then withdrew its appeal. The Board approved the stipulation pursuant to 43 CFR 4.913, and here partially dismisses the appeal as to the issue involving PLO 5164.

Subsequent to Northway Natives, Inc., withdrawing its appeal as to PLO 5164, the U.S. Air Force filed a motion claiming use of certain lands in connection with PLO 5164. The Board here finds that it will not allow intervention following resolution of the issue relating to PLO 5164 lands; neither will the Board allow an intervenor to introduce new issues after the appeal period established by 43 CFR 4.903 has expired. The U.S. Air Force's Motion to intervene is denied. This is a partial decision in the *Appeal of Northway Natives, Inc.*, ANCAB VLS 78-57; other issues in that appeal remain before the Board.

Jurisdiction

The Alaska Native Claims Appeal Board, pursuant to delegation of authority to administer the Alaska Native Claims Settlement Act, 85 Stat. 688, *as amended*, 43 U.S.C. §§ 1601–1628 (1976 and Supp. I 1977), and the implementing regulations in 43 CFR Part 2650 and 43 CFR Part 4, Subpart J, hereby makes the following findings, conclusions and decision.

Procedural Background

Northway Natives, Inc. (Northway), filed village selection applications F–14912–A, *as amended*, on Oct. 22, 1974, and F–14912–B, *as amended*, on Dec. 12, 1974, for lands located near the village of Northway. The applications were filed under the provisions of § 12(a) of the Alaska Native Claims Settlement Act (ANCSA), Dec. 18, 1971 (85 Stat. 688, 701; 43 U.S.C. §§ 1601, 1611(a)) (Supp. V 1975).

The Bureau of Land Management (BLM) published in 43 FR 28051 (June 28, 1978), its Decision to Issue Conveyance (DIC) of land to Northway, in response to village selection applications F–14912–A, *as amended*, and F–14912–B, *as amended*. On July 28, 1978, Northway filed an appeal alleging, *inter alia*, in its Statement of Reasons that the BLM had erred in excluding certain tracts of land from the DIC.

Since this partial decision deals with the issue relating to the exclusion of P.L.O. No. 5164, 37 FR 4713 (Mar. 4, 1972) (PLO 5164) and the U.S. Air Force's (Air Force) claim to lands purported to be used in connection with PLO 5164 lands, only that portion of item numbered V of appellant's Memorandum in Support of its Statement of Reasons dealing with PLO 5164 is referred to in this decision. The pertinent parts of items numbered V read:

> V. *THE BLM ERRED IN EXCLUDING FROM THE INTERIM CONVEYANCE OF JUNE 26, 1978 CERTAIN TRACTS OF LAND BECAUSE NO DETERMINATION HAS BEEN MADE BY THE SECRETARY AS TO THE SMALLEST PRACTICABLE TRACT ENCLOSING LAND ACTUALLY USED IN CONNECTION WITH THE ADMINISTRATION OF ANY FEDERAL INSTALLATION.*
>
> Under § 11(a) of the Alaska Native Claims Settlement Act public lands are withdrawn for selection; § 3(e) defines public lands as follows:
>
> "'Public lands' means all Federal lands and interest therein located in Alaska except: (1) the smallest practicable tract, as determined by the Secretary, enclosing land already used in connection with the Administration of any Federal installation, * * *"
>
> The Secretary has not made these required determinations as to the Federal installations excluded from Northway's selection and listed in Northway's Motion for Segregation and Remand for Section 3(e) determination.
>
> * * * * *
>
> H. *PLO 5164.*
>
> PLO 5164 dated February 28, 1972 withdrew for the Airforce [sic] five siesmic [sic] borehole sites and over thirty-three miles of interconnecting access and cable routes for a total of approximately 400 acres. No § 3(e) application has been filed, and no § 3(e) determination has been made by the Secretary on these lands. For this reason these lands should not have been excluded from selection by Northway in the DIC dated June 26, 1978. Even if the exclusion from the DIC dated June 26, 1978 of the borehole sites is determined to be proper, the interconnecting access and cable routes should not be excluded from conveyance, but rather should be reserved as easements. Since § 2650.4–7(a)(6) of the proposed easement regulations provides that reserved easements may be limited to government use, if any of the borehole sites is determined to be validly withheld from conveyance, the interconnecting access and cable route should be remanded to the BLM for review and determination under the new easement regulations when they have been finally adopted.
>
> * * * * *
>
> *CONCLUSION*
>
> Since no proper determination has been made by the Secretary pursuant to ANCSA § 3(e) as to the smallest practicable tract enclosing land actually used in connection with federal installations listed above, this portion of this appeal should be remanded to the Bureau of Land Management for such proper determinations.

Appellant's Memorandum in Support of Statement of Reasons, at 34.

Northway and the BLM filed a joint stipulation on Apr. 23, 1979, and included, *inter alia*, the following agreement approved by Board order dated May 25, 1979:

> 4. The BLM and Northway agree that the BLM decision under appeal did not affect and did not purport to adjudicate the Northway selection of the following

> tracts which were excluded from the description of lands to be conveyed to Northway:
>
> * * * * *
>
> *b) PLO 5164*
>
> BLM and Northway agree that the BLM will issue decisions adjudicating the Northway selection of these tracts at a later date. *Northway therefore withdraws its appeal as to these tracts.* [Italics added.]

Northway and BLM Stipulation, at 2–3.

The Air Force filed a Motion to Intervene on Mar. 7, 1980, claiming use of the following lands in T. 15 N., R. 19 E., C.R.M., in connection with PLO 5164:

> Section 20: E½SE¾
> Section 28: NE¼, N½NW¼, N½S½ NW¼, N½SE¼, SE¼SE¼
> Section 29: NE¼NE¼
> Section 33: NE¼, N½NE¼SE¼
> Contains 700.00 acres, more or less.

Air Force Motion to Intervene, Exhibit "A".

The Air Force requests the Board to remand the lands described above to the BLM for adjudication of its claim.

On Mar. 18, 1980, BLM filed a Motion to Remand those lands claimed by the Air Force. BLM states that it learned for the first time on Mar. 3, 1980, that the Air Force claims certain land, other than that withdrawn by PLO 5164, as not being public lands withdrawn for Native selection. BLM takes the position that the lands claimed by the Air Force should be remanded to the BLM in order to adjudicate the claim of the Air Force. On Mar. 27, 1980, the Board denied BLM's motion.

The Board issued a show cause order to the Air Force on Mar. 25, 1980, so that the Board could determine if the Air Force has the necessary "property interest" required by 43 CFR 4.902; and second, whether the issue raised could be considered within a Motion to Intervene, or, if in fact, it is a new appeal and therefore barred from administrative review because of lack of timeliness pursuant to 43 CFR 4.903. The order required the Air Force to show why it has standing to intervene and why the issue raised is proper for consideration in this appeal.

On the question of standing to intervene, the Air Force recites 43 CFR 4.909(b) and 4.902 and, as an agency of the Federal Government, claims standing pursuant to § 4.902 in its Response to Order to Show Cause filed on Apr. 15, 1980.

As to the question of why the issue raised is proper for consideration in this appeal, the Air Force claims use of lands described in PLO 5164 and Exhibit "A" to its Motion to Intervene, since prior to Dec. 18, 1971. The Air Force cites *Wilcox* v. *Jackson*, 38 U.S. (13 Pet.) 498 (1839), where the court held that use of public lands under authority of law appropriates the land used and then contends that "it is authorized to perform a classified mission at Beaver Creek and the land used is thus held under authority of law." The Air Force also contends that:

> [T]he land required, in addition to that formally set forth in PLO 5164, has been

> appropriated by virtue of PLO 5164 and also by authority of the Air Force to perform its mission at Beaver Creek. It follows that the Board cannot make a final decision concerning PLO 5164 without considering the land appropriated by virtue of PLO 5164. This is true regardless of any stipulation entered into by any of the parties unless the Air Force has legally concurred in that stipulation.

Air Force Response to Order to Show Cause, at 3.

The Air Force's claim that it used the lands since prior to ANCSA (Dec. 18, 1971), and its claim to such lands "under authority of law," resulted in the Board ordering, on May 23, 1980, the Air Force to file additional information as follows:

> a. Submit a copy of all applications for use of land in connection with the Beaver Creek project. For classified applications pursuant to 43 CFR 2351.(a) [sic] [43 CFR 2351.2(a)] provide application number and date submitted to BLM.
>
> b. The Air Force asserts that "it is authorized to perform a classified mission at Beaver Creek and the *land used is thus held under authority of law. Evidence of this is shown by PLO 5164.*" [Italics added.] The Air Force must be more specific as to the *authority of law* allowing use of land not withdrawn by PLO 5164.
>
> c. Submit a copy of the document reserving use of PLO 5164 withdrawn lands during the period January 17, 1969 to February 28, 1972 (date PLO 5164 was signed), and any other lands for which the Air Force asserts authority to use.

Board's Order for Information, at 1–2.

On July 7, 1980, the Air Force filed a response to the Board's order of May 23, 1980, to the effect that:

a. PLO 5164 appears to be the only formal application for use of public lands in the Beaver Creek area. There appears to be no other application except that resulting in PLO 5164.

b. There is no document, to the Air Force's knowledge, reserving use of PLO 5164 lands during the period Jan. 17, 1969 to Feb. 28, 1972. The Air Force stresses that their claim to land is not made by way of formal written documentation.

c. The Air Force cites the court's ruling in *Wilcox* v. *Jackson*, *supra*, again for its claim to lands "under authority of law" that the function, and therefore the occupancy, at Beaver Creek was authorized by the Secretary of the Air Force.

d. The Air Force suggests the Board remand this appeal to the BLM for a 3(e) determination.

Doyon, Limited (Doyon), in responding to the Air Force on Aug. 15, 1980, disagrees with the Air Force. Doyon asserts the Board lacks jurisdiction to consider the Air Force's claim and its untimely attempt to interject new issues into this appeal.

BLM responded to Doyon on Aug. 27, 1980, as follows:

> 1. The Air Force has claimed that it has used the lands at issue since *prior to* December 18, 1971. See, Motion to Intervene dated March 7, 1980. If these lands were appropriated by such use, the appropriation preceded the § 11(a)(1) withdrawal and § 11(a)(1) cannot be construed as a bar to such appropriation.
>
> 2. If the pre-ANCSA use alleged by the Air Force meets the requirements of § 3(e)(1), the lands were not "public lands" and therefore were unaffected by the § 11(a)(1) withdrawal.

3. No statute, regulation or BLM policy currently requires a federal agency to submit a "§3(e) application." Therefore, there is no basis for Doyon's assertion that lands not subject to such an application cannot be remanded for a § 3(e) determination.

4. The Board clearly has jurisdiction to grant BLM's Motion to Remand as explained in BLM's Memorandum In Support Of Request For Reconsideration dated April 7, 1980.

BLM's Response to Doyon's Response to U.S. Air Force, at 1–2.

Decision

Northway's appeal as to the exclusion of PLO 5164 in the DIC and the Air Force's motion to intervene raises three issues for resolution by the Board:

a. Does Northway's conditional withdrawal of the PLO 5164 issue resolve that issue in the above-captioned appeal?

b. Does Northway's conditional withdrawal of its appeal as to the issue of PLO 5164 dispose of the issue to prohibit intervention by one not a party to the appeal at the time of withdrawal?

c. Should the Air Force, as an intervenor, be allowed to introduce new issues to the appeal?

Northway, in its statement of reasons in the above-captioned appeal alleged that the BLM had erred by excluding certain lands in the DIC because no § 3(e) determinations had been made by the Secretary. PLO 5164 is one of the land areas at issue. Northway asserts that PLO 5164 lands should not have been excluded from the DIC because no § 3(e) application had been filed and no § 3(e) determination has been made. Furthermore, Northway asserts that even if exclusion of PLO 5164 lands is determined to be proper, the interconnecting access and cable routes should not be excluded from conveyance, but rather should be reserved as easements.

Northway withdrew its appeal on the issue of PLO 5164 based on the conditional agreement with the BLM that the BLM will issue a decision adjudicating Northway's selection of PLO 5164 at a later date.

[1] 43 CFR 4.913(b) provides for Board approval of agreements of the type entered into between the BLM and Northway by stipulation on Apr. 23, 1979, and approved by the Board on May 25, 1979. Northway's withdrawal resolves the issue involving PLO 5164. Where one issue on appeal is that BLM erred by excluding certain lands from conveyance without adjudicating the status of such lands, and the appellant and BLM stipulate to withdrawal of the appeal on condition that BLM will later adjudicate the status of such lands, then the issue is resolved and the Board will order partial dismissal of the appeal as to that issue.

The Air Force's description of lands it claims to have used in connection with PLO 5164 incorporates lands withdrawn by PLO 5164 as well as lands in the immediate vicinity. The Air Force's Motion to Intervene addresses two classes of land:

(1) Lands withdrawn by PLO 5164, excluded in the DIC and subsequently appealed by Northway.

(2) Lands selected by Northway and approved for conveyance without being appealed during the appeal period allowed by 43 CFR 4.903.

The Board, in *Appeal of Bristol Bay Native Corp.*, 4 ANCAB 222, 228, 87 I.D. 164, 167 (1980) [VLS 80–2], discusses intervention:

> Intervention in proceedings before the Board is provided for by 43 CFR 4.909 (b), which states, "Any person may petition the Board to intervene in an appeal. Upon a proper showing of interest under § 4.902, such person may be recognized as an intervenor in the appeal." Other than requiring service upon all parties of any motion to intervene and the filing with the Board of a certificate of service, 43 CFR 4.909(d), the regulations are void of any further requirements or guidelines regarding intervention.

The Board adopts the rulings made in *Appeal of Bristol Bay Native Corp., supra*, in disposing of the Air Force's motion with respect to PLO 5164 lands.

[2, 3] The provision of 43 CFR 4.909(b) stating that a petitioner "may be recognized as an intervenor" bestows on the Board discretion as to whether to allow intervention. In the discretion vested in the Board with regard to intervention, the Board hereby rules that it will not allow intervention following resolution of the issues on appeal.

As to lands the Air Force claims it used in conjunction with PLO 5164 lands, the DIC approved these lands for conveyance and no one appealed the decision of the BLM as to such lands during the appeal period. Therefore, the Board finds the motion of the Air Force to intervene as to these lands not appealed introduces a new issue to the appeal after the appeal period expired.

[4] In the discretion vested in the Board with regard to intervention, the Board will not allow introduction of new issues to an appeal by an intervenor.

Based on the above findings, conclusions and ruling, the motion of the Air Force to intervene in the above-captioned appeal is hereby Ordered denied.

As a result of dismissal of this appeal as to issues involving the exclusion of PLO 5164, and denial of the Air Force's Motion to Intervene, the lands associated with those matters are no longer affected by any issue on appeal. Therefore, in keeping with the Board's policy of segregating lands unaffected by issues on appeal, the following lands are segregated from the remaining lands in dispute and remanded to BLM:

T. 15 N. 19 E. Copper River Meridian

Section 20: E½SE¼
Section 28, excluding PLO 5164 lands and other lands already excluded in the DIC here appealed: NE¼, N½NW¼, N½S½NW¼, N½SE¼, SE¼SE¼
Section 29: NE¼NE¼
Section 33: NE¼, N½NE¼SE¼
Containing 700.00 acres, more or less.

Conveyance of these lands should not be delayed pending resolution of the remaining issues on appeal.

Based on the foregoing findings and rulings, the Board finds it unnecessary to rule on BLM's Motion for Reconsideration.

JUDITH M. BRADY
Administrative Judge

JOSEPH A. BALDWIN
Administrative Judge

LITE SABIN

51 IBLA 226
Decided *December 15, 1980*

Appeal from decision of the New Mexico State Office, Bureau of Land Management, rejecting oil and gas lease offer NM 38277.

Reversed and remanded.

1. Administrative Procedures: Generally—Rules of Practice: Generally—Notice: Generally

Any document which is sent by certified mail to an individual at his record address is considered to have been served at the time of return by the post office of the undelivered certified letter, such constructive service being equivalent in legal effect to actual service of the document.

APPEARANCES: Craig R. Carver, Esq., Head, Moye, Carver & Ray, Denver, Colorado, and James W. McDade, Esq., Washington, D.C., for appellant.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

This appeal is from a decision dated July 22, 1980, by the New Mexico State Office, Bureau of Land Management (BLM), rejecting appellant's oil and gas lease offer NM 38277.

The offer, filed for Parcel No. 1122, was first drawn at the public drawing held in the State Office on Sept. 11, 1979.

The decision rejected the offer on the ground that appellant had failed to timely file a "Certification of Qualifications to Hold a Federal Oil and Gas Lease."

On May 22, 1980, BLM mailed appellant's certification via certified mail "restricted delivery" to her address of record, 115 South LaSalle, Chicago, Illinois. This is the address of Stewart Capital Corporation (Stewart), appellant's filing service.

With her statement of reasons appellant has included the affidavit of one of Stewart's employees. The affidavit states that the envelope bearing the certification was received by Stewart on May 28, 1980, appellant's permanent address was written thereon by Stewart, and it was forwarded to appellant. However, the post office attempted a second delivery of the envelope to the South LaSalle street address on Saturday, May 31, 1980, when Stewart's offices were closed. Affixed to the envelope are stickers marked "05/31/80, Return to Sender, Not Deliverable as Addressed, Unable to Forward." Appellant's permanent address has been crossed out by heavy black crayon. The envelope was returned to the New Mexico State Office on June 9, 1980.

The affidavit asserts that the New Mexico State Office routinely mails the correspondence of its clients to the South LaSalle street address via restricted delivery. The affidavit explains Stewart's procedure for handling such correspondence:

> Unable to sign for such documents, Stewart Capital Corporation has determined that it should have these documents forwarded to the client at his/her permanent address. Consequently, the envelopes so marked which are received by Stewart Capital Corporation are marked "Please Forward" and the client's permanent address is affixed. A copy of the envelope is taken to verify the forwarding request and the envelope, unopened, is given back to the postman for further handling. Stewart Capital Corporation then immediately notifies the client to expect the envelope and requests that the client advise it as to the contents of the envelope so that it can advise the client as to the proper method of complying with the BLM's request. If Stewart Capital Corporation has received no response to this letter from the client within a week or so, it contacts the client to see if the letter has, in fact, been received by the client. If not, steps are then taken to obtain a copy of the contents of the envelope directly from the Bureau of Land Management office from which it originated.

With respect to the envelope here at issue the affidavit states that a

> restricted delivery letter from the New Mexico office of the Bureau of Land Management was received by Stewart Capital Corporation and forwarded to Lite Sabin per established procedure on May 28, 1980. Mrs. Sabin was immediately notified of this fact and she advised Stewart Capital Corporation June 19, 1980, that she had still not received it. At that point, Stewart Capital's legal counsel took steps to obtain a copy of the documents involved, which turned out to be a Certification of Qualifications to hold a Federal Oil and Gas Lease. These copies were forwarded to Mrs. Sabin for action. It was ascertained at that time that the forwarding request applied to the envelope by Stewart Capital Corporation had been obliterated by the Post Office at its own discretion and that the envelope had been returned to the New Mexico office of the BLM as unforwardable on June 9, 1980. Believing that Mrs. Sabin would be allowed thirty days from the date of the return of the envelope to the point of its origin within which to reply, our legal counsel advised that she should submit the documents requested no later than July 8, 1980. Mrs. Sabin signed the documents and forwarded them to the BLM on July 2, 1980, and they were received by the BLM, per its decision dated July 22, 1980, on July 7, 1980.

Appellant contends that 43 CFR 1810–2(b) [1] does not allow a presumption of receipt of a BLM document to arise where the actions of the New Mexico State Office precluded [2] receipt. Appellant contends that BLM failed to comply with this regulation because it mailed the certification in a manner in which it could not be accepted by appellant's agent at appellant's address of record. Restricted delivery, appellant argues, defeated due process and notice which are policies of the regulation.

---

[1] 43 CFR 1810.2(b) provides:

"Where the authorized officer uses the mails to send a notice or other communication to any person entitled to such a communication under the regulations of this chapter, that person will be deemed to have received the communication if it was delivered to his last address of record in the appropriate office of the Bureau of Land Management, regardless of whether it was in fact received by him. An offer of delivery which cannot be consummated at such last address of record because the addressee had moved therefrom without leaving a forwarding address or because delivery was refused or because no such address exists will meet the requirements of this section where the attempt to deliver is substantiated by post office authorities."

[2] Appellant's posture is not without logic. If appellant had gone to Europe for 6 months and had left an agent fully authorized to act on her behalf and BLM had sent a communication by "restricted delivery," it is obvious that appellant would not have received notice within which timely action could have been taken. It is not apparent from the record what useful purpose, if any, was sought to be served by the use of "restricted delivery."

Appellant further contends that in any case, the completed certification was timely received by BLM.[3]

[1] We need not discuss the issue whether BLM complied with the cited regulation because we agree with appellant that her completed certification was timely received by BLM. In *James W. Heyer*, 2 IBLA 318 (1971), the Board stated:

> A document which is sent by certified mail to an individual at his record address is considered to have been served at the time of return by the post office of the undelivered, certified letter, such constructive service being equivalent in legal effect to actual service of the document.

This principle is stated also in 43 CFR 4.401(c)(3).

We conclude that BLM incorrectly considered the 30-day period as running from May 31, 1980. According to the above authorities, that period began to run as of June 9, 1980, when the undeliverable certification was returned to BLM. Thus, appellant had until July 9, 1980, to file her certification. Since the document was filed on July 7, the lease offer was improperly rejected for untimely filing of the certification.

Our holding herein is not inconsistent with that reached in *Brooks Griggs*, 51 IBLA 232, 87 I.D. 612 (1980), also decided this date. The cases are distinguishable on their facts, in that in *Griggs*, we found that the certification was not delivered by the postal service to the offeror's address of record, whereas in the instant case it was.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed and BLM is instructed to issue appellant the lease, all else being regular

EDWARD W. STUEBING
Administrative Judge

WE CONCUR:

BERNARD V. PARRETTE
Chief Administrative Judge

DOUGLAS E. HENRIQUES
Administrative Judge

BROOKS GRIGGS

51 IBLA 232

Decided *December 15, 198*

Appeal from decision of the New Mex ico State Office, Bureau of Land Man agement, rejecting oil and gas leas offer NM-A 36164.

Set aside and remanded.

1. Notice: Generally—Oil and Ga Leases: Generally

Where BLM sends by certified mail notice to an offeror at his record a dress that he must file a certificate

---

[3] The appellant also suggests that the information sought by BLM was already present in the record. The record does contain a second copy of the certification. That copy, however, is not executed or signed by appellant.

to his qualification to hold an oil and gas lease, and the letter is returned to BLM marked "Not Deliverable as Addressed, Unable to Forward," and it is established that nondelivery was due to post office error, the appellant will not be considered to have received notice, and the rejection of the lease offer will be set aside.

APPEARANCES: Craig R. Carver, Esq., Head, Moye, Carver & Ray, Denver, Colorado; James W. McDade, Esq., Washington, D.C., for appellant.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

INTERIOR BOARD LAND APPEALS

This appeal is from a decision dated July 24, 1980, by the New Mexico State Office, Bureau of Land Management (BLM), rejecting oil and gas lease offer NM-A 36164.[1]

Appellant's offer for parcel No. 464 was drawn number one at a public drawing held in the State Office on Feb. 13, 1979. The decision gives the following reason for rejecting the offer:

> Pursuant to Washington's Instruction Memorandum No. 80-492, a Certification of Qualifications to Hold a Federal Oil and Gas Lease (Simultaneous) was mailed to Ms. [*sic*] Griggs on May 20, 1980 by certified return receipt mail. The certification was mailed to Ms. Griggs' address of record, 115 South La Salle, Room 2435, Chicago, IL 60606. The certification was returned to this office marked "Not Deliverable As Addressed, Unable to Forward", on June 2, 1980.
>
> The certification states: "Please sign, complete and return to this office the enclosed certification. If the properly signed and *completed* certification is not returned within 30 days from receipt of this notice, the applicant will have failed to demonstrate qualifications to hold this oil and gas lease and the offer will be rejected." The certification was not filed in this office.
>
> Offer to lease NM-A 36164 is hereby rejected as of June 27, 1980, per our Field Solicitor's instructions to use the last date of attempted delivery in calculating the 30 days. Last attempted date of delivery was May 28, 1980. Therefore, the end of the 30-day period for compliance was June 27, 1980. (See 43 CFR 1810.2.) [Italics in original.]

BLM sent appellant's certification via certified mail No. 5606 "Restricted Delivery" to his address of record which is the address of Stewart Capital Corp. (Stewart), appellant's filing service. Quoting the Domestic Mail Manual sec. 933.1, appellant states that restricted delivery

> is a service by which a mailer may direct that delivery be made only to the addressee or to an agent of the addressee who has been specifically authorized in writing to receive his mail. This service is available only for articles addressed to natural persons specified by name.

Affixed to the envelope bearing the certification is a sticker marked "05/28/80, Return To Sender. Not Deliverable as Addressed, Unable To Forward." The envelope was returned to the New Mexico State Office and is date stamped by that office June 2, 1980.

Appellant contends that Stewart at no time received an attempt to deliver the envelope in question. With his statement of reasons, appellant has included the affidavit of one of Stewart's employees. The affidavit asserts that the New Mexico State Office routinely mails the correspondence of its clients to the South LaSalle Street address via restricted delivery. The affidavit goes on to explain Stewart's procedure for handling such correspondence:

---

[1] This offer was previously before the Board in *Brooks Griggs*, 44 IBLA 185 (1979), for reasons unrelated to the present appeal.

> Unable to sign for such documents, Stewart Capital Corporation has determined that it should have these documents forwarded to the client at his/her permanent address. Consequently, the envelopes so marked which are received by Stewart Capital Corporation are marked "Please Forward" and the client's permanent address is affixed. A copy of the envelope is taken to verify the fowarding request and the envelope, unopened, is given back to the postman for further handling. Stewart Capital Corporation then immediately notifies the client to expect the envelope and requests that the client advise it as to the contents of the envelope so that it can advise the client as to the proper method of complying with the BLM's request. If Stewart Capital Corporation has received no response to this letter from the client within a week or so, it contacts the client to see if the letter has, in fact, been received by the client. If not, steps are then taken to obtain a copy of the contents of the envelope directly from the Bureau of Land Management office from which it originated.

With respect to appellant's mail, the affidavit states:

> In the case of Brooks Griggs, as regards the above referenced lease, Stewart Capital Corporation's records indicate that two restricted delivery letters addressed to Brooks Griggs were successfully forwarded to Mr. Griggs per the procedure outlined above. The first instance, occurring in February, 1980, involved a notice of rental due, and the second instance, occurring in July, 1980, involved a decision rejecting the offer to lease. There is no written record of any attempt being made by the Post Office to deliver any other restricted delivery letters to Brooks Griggs regarding this lease at Stewart Capital Corporation's Chicago office. In particular, there is no record of any attempt to deliver the restricted delivery letter during May 28, 1980, to which the July, 1980, Decision of the Bureau of Land Management refers. All employees of Stewart Capital Corporation present during that time have been questioned and none recalls such an attempt. Furthermore, a notation to the effect that such an envelope was received and what action was taken regarding it would have been made in Stewart Capital Corporation's certified letter "log".

Appellant contends that he was prevented from receiving notice because of breach of duty by the post office, that such breach of duty is imputed to the New Mexico State Office, and that under the facts of this case he cannot be considered as having received constructive notice pursuant to 43 CFR 1810.2(b), which provides:

> (b) Where the authorized officer uses the mails to send a notice or other communication to any person entitled to such a communication under the regulations of this chapter, that person will be deemed to have received the communication if it was delivered to his last address of record in the appropriate office of the Bureau of Land Management, regardless of whether it was in fact received by him. An offer of delivery which cannot be consummated at such last address of record because the addressee had moved therefrom without leaving a forwarding address or because delivery was refused or because no such address exists will meet the requirements of this section where

> the attempt to deliver is substantiated by post office authorities.

Appellant contends that BLM failed to comply with this regulation because it mailed the letter in a manner receivable only by himself. The regulation, appellant points out, requires only that a communication be mailed to a "last address of record," not the person himself. Appellant also argues that under the regulation a presumption of receipt of a document cannot arise where BLM is aware of nondelivery and fails to correspond with an applicant's attorney of record. Appellant suggests that in using restricted delivery BLM overreached itself and defeated the object of the regulation—communication by mail reasonably certain to provide notice to an applicant.

[1] The question presented for decision is whether appellant had sufficient notice to enable him to file his qualifications in connection with lease offer NM-A 36164. We think not.

43 CFR 1810.2(b) states that an offer of delivery which cannot be consummated because the addressee has moved without leaving a forwarding address, or because delivery is refused, or because no such address exists, will serve as notice where the attempt to deliver is substantiated by the post office.

As appellant has pointed out, none of these three circumstances is present in the case before us. In *Jack R. Coombs*, 28 IBLA 53 (1976), where these three circumstances were also absent, the Board held that the fault for nondelivery must rest with the Post Office. Herein, the South La Salle Street address was appellant's address of record, and Stewart, the addressee's agent, had developed a procedure for handling and forwarding BLM's restrictive service mailings to its clients. On the basis of the affidavit and appellant's uncontroverted statements its appears that no attempt was made to deliver the envelope in question on Wednesday, May 28, 1980, the date of "notice" relied on in BLM's decision. In *Joan L. Harris*, 37 IBLA 96 (1978), the Board took official notice of relevant postal service regulations incorporated by reference in 39 CFR 111.1. Those regulations require a carrier to leave notice of the certified mail if he cannot deliver the certified letter for any reason. A letter which is not deliverable is to be held at the post office. If not called for within 5 days, a second notice is to be issued. If the letter is not called for or redelivery requested, it is to be returned to the sender at the expiration of the period stated by the sender or after 15 days if no period is stated.

Had these procedures been followed in the case before us the letter obviously could not have been returned to the New Mexico State Office by Monday, June 2. On the record, it is apparent that the post office erred in its handling of this item of certified mail in that it failed to follow its own required procedures. Since the error prevented appellant from receiving notice, BLM's rejection of his lease offer was not proper. Having disposed of the appeal on this basis, appellant's other arguments need not be discussed.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from its set aside and the case is remanded to BLM.

EDWARD W. STUEBING
Administrative Judge

WE CONCUR:

DOUGLAS E. HENRIQUES
Administrative Judge

BERNARD V. PARRETTE
Chief Administrative Judge

NEW OCS UNITIZATION RULES—AUTHORITY OF THE SECRETARY TO SEGREGATE PARTIALLY UNITIZED OFFSHORE LEASES

M-36927

December 16, 1980

Outer Continental Shelf Lands Act: Generally

The legislative history of the OCS Lands Act shows that the Secretary is authorized to modify and incorporate the regulatory provisions of the Mineral Leasing Act, as they existed in 1953 when the OCS Lands Act was passed, into OCS leasing regulations as the circumstances of offshore leasing make appropriate.

Outer Continental Shelf Lands Act: Unit Plans

Sec. 5 of the OCS Lands Act implicitly authorizes the Secretary to require compulsory unitization of offshore oil and gas leases.

Outer Continental Shelf Lands Act: Unit Plans

The Secretary is not authorized to require compulsory segregation of an offshore oil and gas lease when part of it is committed to a unit agreement.

Oil and Gas Leases: Unit and Cooperative Agreement

The authority to segregate partially unitized oil and gas leases must be clear, since segregation creates two new leases from a single lease and fundamentally modifies a lessee's legal rights and obligations. Such authority will not be presumed or extrapolated from a general grant of regulatory authority.

Outer Continental Shelf Lands Act: Unit Plans

Sec. 5 of the OCS Lands Act of 1953 does not provide the clear authority required to permit segregation of OCS leases, since it neither expressly mentions the power to segregate nor incorporates the segregation authority added to the Mineral Leasing Act in 1954.

Outer Continental Shelf Lands Act: Unit Plans

The U.S. Geological Survey may not condition its approval of any unit agreement or development plan for an offshore oil and gas lease upon the lessee's consent to segregation.

Outer Continental Shelf Lands Act: Generally

The Secretary generally is free to adopt any reasonable regulatory measures which he determines to be necessary and proper to prevent waste, conserve natural resources, protect correlative rights, or carry out the leasing provisions of the OCS Lands Act, regardless of whether such measures are expressly listed in either that Act or the Mineral Leasing Act.

Outer Continental Shelf Lands Act: Oil and Gas Leases

The Secretary is authorized to require the prompt and efficient exploration and development of the entire area of each offshore oil and gas lease by § 5 of the OCS Lands Act, various regulations, the terms of each lease, and, in some cases, implied covenants of diligent development.

Continental Oil Company, 74 I.D. 229 (1967), distinguished.

To: Secretary of the Interior
From: Solicitor
Subject: New OCS Unitization Rules—Authority of the Secretary to Segregate Partially Unitized Offshore Leases

You have asked for my opinion on several questions of law concerning the new unitization rules for offshore oil and gas leases.[1] Specifically, you have requested my views regarding the validity of those rules which provide for the segregation of partially unitized OCS leases. Several offshore operators have challenged the authority of the Secretary to segregate such leases without the lessees' consent. This opinion examines those rules and clarifies the scope of the Secretary's OCS regulatory authority under the Outer Continental Shelf Lands Act.[2]

I. *CONCLUSIONS*

Sec. 5 of the Outer Continental Shelf Lands Act implicitly authorizes the Secretary to require compulsory unitization of offshore leases. The Secretary is not authorized, however, to require compulsory segregation of partially unitized OCS leases. The clear authority required for such segregation is not provided in the OCS Lands Act. The new segregation rules are thus invalid and must be modified to conform with this opinion. The basic objective of segregation under these regulations is to require the prompt and efficient exploration and development of the entire area of each OCS lease. The Secretary may still achieve this goal by other, authorized means. The necessary authority is provided by the OCS Lands Act, various regulations, the terms of each OCS lease, and, in some cases, implied covenants of diligent development.

II. *BACKGROUND*

A. *What Unitization and Segregation Entail*

The following is a simplified summary intended to clarify the nature of the subject problem. It is not meant to be a comprehensive or definitive statement of the law unitization.

---

[1] 30 C.F.R. 250.51–52, 45 Fed. Reg. 29280 (May 2, 1980).

[2] 43 U.S.C. § 1331 *et seq.* (hereafter "OCS Lands Act").

1. *The OCS Leasing System*

The OCS Lands Act, 43 U.S.C. § 1331 *et seq.*, provides a comprehensive system for the leasing of minerals on the Outer Continental Shelf. Unlike most commercial leases, an OCS oil and gas lease does not have a definite length of duration or "term." Instead, the OCS Lands Act divides the lease term into two phases. The first phase, called the "primary term," is the initial amount of time the lessee is given to explore and drill for oil and gas. During this initial period, which usually lasts five (5) years,[3] the lease generally will not expire, so long as the lessee pays the rent.[4] During the second phase, however, the lease may continue only as long as oil or gas is produced from the area in "paying quantities," or drilling or well reworking[5] operations are being conducted. 43 U.S.C. § 1337(b)(2). Thus, after the primary term, the term of each lease is indefinite and contingent upon performance by the lessee of one of the above activities within the lease area.

This "use it or lose it" rule is complicated by the nature of oil and gas production. Under the Rule of Capture, a rule of property ownership, oil and gas belong not to the person under whose lands they lie, but to the person who extracts or "captures" them from the ground. Frequently a single reservoir of oil or gas may underlie lease tracts belonging to two or more separate owners. In such cases, due both to the Rule of Capture and to the migratory nature of oil and gas, a strong incentive exists for each owner to produce as much oil and gas as possible from his own lease to prevent drainage to adjoining leases. In the past, this incentive has led to needless and costly drilling and large-scale waste of oil and gas.[6]

2. *Unitization of Leases Over Common Reservoirs*

Unitization removes this incentive and its concomitant problems. "Unitization" is an agreement between lessees (approved by the lessors) to treat the area above a common reservoir as one lease, *i.e.*, as a "unit." The separately owned lease interests are combined or consolidated for purposes of joint exploration and development of the reservoir. The lessees agree to share the cost and liabilities of production and to divide the oil or gas they produce under the terms of a "unit agreement."[7] By this arrangement the lessees can limit the number of wells drilled, drill in the most efficient locations, and control the rate of extraction, so as to maximize production and minimize costs. Pursuant to the existing regulations, the area subject to the unit agreement, the "unit area," may include only that portion of each lease under which the common reservoir lies.[8] Each lessee is free to develop the remaining portions of his lease at his sole profit or loss, unless such portions are subject to another unit agreement.

---

[3] *See* 43 U.S.C. § 1337(b)(2) (A) and (B).

[4] OCS leases also require the lessee to explore and develop the lease tract diligently.

[5] "Reworking" is performing maintenance on a well. It is also called "workover."

[6] Initially, oil and gas are pushed out of the ground by natural pressure as water or gas moves or expands in the reservoir. If the reservoir is developed too rapidly, this natural pressure may dissipate inefficiently and force out less oil and gas. The lessees must then either leave the oil or gas in the ground or resort to more expensive methods of production. *See generally* Kaveler, *The Engineering Basis for and the Results from the Unit Operation of Oil Pools*, 23 Tul. L. Rev. 331, 334 (1949).

[7] *See* 30 C.F.R. 250.2(iii), 45 Fed. Reg. 29285 (May 2, 1980).

Unitization potentially creates a conflict, however, with the above-described "use it or lose it" rule. If for example, for engineering reasons all development work on a reservoir is done within one lease, ordinarily all other leases in the overlying unit area would expire after their primary terms, since no production, drilling, or reworking is occurring on those leases. This would encourage needless drilling by the other lessees simply to maintain their own leases and would thus frustrate one of the major purposes of unitization.

To resolve this conflict, the law provides that any drilling or production on one part of a unit area is attributable to all other parts of a unit area, even though such parts are on separate lease tracts. *Solicitor's Opinion*, M-36629, 69 I.D. 110, 111-12 (1962). Thus, if drilling or production on one lease within a unit area is sufficient to hold that lease beyond its primary term, all other leases within the unit area will also be continued. *Id.* This rule is called "constructive production" or "attributed production." This idea is consistent with the premise that the unitized area is to be operated as one lease.

3. *Segregation of Partially Unitized Leases*

"Segregation" refers to the practice of separating into distinct and different leases that portion of a lease which is committed to a unit agreement and that portion which is not so committed. Essentially segregation means splitting a lease in two whenever part of a lease is unitized.

This practice in turn has a significant impact on the "use it or lose it" rule. Since the portion of a lease outside the unitized area is segregated and thus considered a separate lease, any work done inside the unit area, even if within the unitized portion of the original lease tract, will no longer be attributed to the non-unitized portion under the rule of constructive production. Therefore, to maintain the nonunitized portion of a segregated lease past its primary term, the lessee must demonstrate adequate production, drilling, or reworking on that portion itself, independent of the obligations of the unitized portion. The theory behind this practice is that applying separate production requirements to each portion will encourage prompt development of the lease area in the entirety.

---

[8] *See* 30 C.F.R. 250.50(b), 45 Fed. Reg. 29285 (May 2, 1980).

4. *Authority to Segregate Must be Clear*

Because of these additional obligations resulting from segregation, the common-law of the state courts has generally provided that, unless the parties to an oil and gas lease have expressly agreed that the lease may be divided upon unitization, segregation will not be allowed without mutual consent. This presumption is known as the common-law "rule of indivisibility."[9] Specifically, the rule states that the habendum clause, which defines the term, of an oil and gas lease is indivisible unless there is a clear expression to the contrary.

Due in part to this common-law rule, this Department has also consistently held that the Secretary is not authorized to segregate onshore oil and gas leases issued under the Mineral Leasing Act, 30 U.S.C. § 181 *et seq.*, unless that act explicitly provides for such authority. These decisions will be more fully discussed below. In light of this firm position, and at the Department's request, Congress amended the Mineral Leasing Act in 1954 to expressly authorize segregation of partially unitized onshore leases.[10] This long-standing departmental recognition of the need for clear legislative authority to segregate onshore oil and gas leases is equally applicable to OCS leases.

B. *The 1980 Regulations On Unitization and Segregation*

On May 2, 1980, the Department promulgated new regulations governing unitization of federal offshore oil and gas leases issued under the OCS Lands Act.[11] The rules were issued pursuant to the Secretary's statutory duty to prescribe regulations for unitization and for the prompt and efficient exploration and development of OCS lease areas. 43 U.S.C. § 1334(a)(4) and (7).

In addition to clarifying and supplementing existing regulations on OCS unitization procedures and requirements, the new rules also provide for the first time that partially unitized OCS leases must be segregated into separate leases.[12] Upon segregation, the rules require that the terms of the original lease be applied separately to the unitized and non-unitized portions of the lease. Thus, the drilling, production, or reworking requirements of the OCS Lands Act must be independently satisfied on each segregated portion to maintain that portion past the primary term of the original lease. Work done on the unitized portion of a lease may not be attributed to the non-unitized portion and *vice versa.*[13] This is the classic concept of segregation. These provisions apply only to leases issued after May 2, 1980, unless the lessee consents to segregation.[14]

---

[9] The rule of indivisibility is really a rule for construing leases rather than a principle of law. The legal rights of the parties are defined by the lease itself, and the lease is whatever the parties agree to. The rule of indivisibility simply states that, unless the right to segregate is made clear, it will not be recognized. *See generally* 5 *Summers Oil & Gas* § 959, p. 80 (1966).

[10] Act of July 29, 1954, P.L. 83–555, 68 Stat. 585.

[11] 30 C.F.R. 250.51–52, 45 C.F.R. 29280–87 (May 2, 1980).

[12] 30 C.F.R. 250.50(g)(1).

[13] 30 C.F.R. 250.50(g)(2) and (1).

Many offshore operators have asserted that these segregation rules are invalid, since the Secretary is not clearly authorized to segregate OCS leases by the terms of the OCS Lands Act. They have petitioned the Secretary to reconsider these regulations and delete the provisions relating to segregation.

III. *ANALYSIS: Authority of the Secretary to Regulate OCS Leases*

A. *The Secretary is Authorized to Require and Regulate Unitization of OCS Leases*

Unlike the Mineral Leasing Act, which explicitly authorizes the Secretary to unitize onshore leases and specifically requires the segregation of all such partially unitized leases,[15] the OCS Lands Act contains no express authority for unitization by the Secretary and does not even mention segregation. Instead, the original § 5 of the OCS Lands Act provided for a broad grant of regulatory authority:

> The Secretary shall * * * prescribe such rules and regulations as may be necessary to carry out such provisions [of the Act relating to OCS leasing]. The Secretary may at any time prescribe and amend such rules and regulations as he determines to be necessary and proper in order to provide for the prevention of waste and the conservation of natural resources of the Outer Continental Shelf, and the protection of correlative rights therein. * * * Without limiting the generality of the foregoing provisions of this section, the rules and regulations prescribed by the Secretary thereunder may provide * * * in the interest of conservation for unitization * * *. 43 U.S.C. § 1334(a)(1) (1964 ed.).

"Unitization" was not defined in the Act itself. The term was presumed to have its common meaning, as well-established in oil and gas law. The 1978 Amendments to the Act[16] deleted the last sentence of the above provision and substituted the following:

> * * * The regulations prescribed by the Secretary under this subsection shall include, but not be limited to, provisions—
>
> * * * * *
>
> (4) For utilization, pooling, and drilling agreement
>
> * * * * *
>
> and
>
> (7) For the prompt and efficient exploration and development of a lease area * * *. 43 U.S.C. § 2334(a)(4) and (7) (1980 supp.).

These changes merely clarify the Secretary's recognized authority to require diligent development of OCS leases and also removed the prefatory phrase "in the interest of conservation," which had formerly qualified the authority to regulate utilization. Otherwise, the original, broad grant of authority over OCS lease administration remained unmodified with respect to the Secretary's unitization powers.[17]

---

[14] 30 C.F.R. 250.50(j).

[15] *See* 30 U.S.C. § 226(j).

[16] Act of Sept. 18, 1978, P.L. 95–372, § 204, 92 Stat. 636.

[17] *See* S. Rep. No. 1091, 95th Cong., 2d Sess. 82–3 (1978).

Although the OCS Lands Act does not expressly so provide, the legislative history of the 1953 Act indicates that the Secretary is authorized to require compulsory unitization of OCS leases. The Act originated as H.R. 5134 and was introduced in 1953 as a supplement to the Submerged Lands Act.[18] Sec. 10(g) of the House bill proposed to make the detailed unitization provisions of the Mineral Leasing Act directly applicable to OCS leases.[19] Those provisions then included, *inter alia*, express authorization for compulsory unitization by the Secretary.[20]

Shortly thereafter, the Senate introduced its own OCS bill, S. 1901.[21] This bill took the opposite approach from the House proposal. Instead of incorporating the detailed provisions of the Mineral Leasing Act, § 5 of S. 1901 gave the Secretary extremely broad regulatory powers: "The Secretary may prescribe such rules and regulations as he determines to be necessary and proper in order to provide for the conservation of the natural resources of the Outer Continental Shelf."[22]

On May 18, 1953, the sponsor of S. 1901, Senator Cordon, wrote to Interior Secretary McKay requesting his views on the Senate bill and on a committee print resembling the House proposal. The Secretary replied on June 8, suggesting a median approach:

> Section 5 of S. 1901 should be amended to expressly authorize the Secretary of the Interior to deal by regulations with such matters as unitization, pooling, subsurface storage of oil and gas, suspension of operations and production, waiver or a reduction of rentals or royalties, compensatory royalty agreements the assignment and surrender of leases, and the sale of royalty oil and gas. This authorization should, we believe, be provided for in general terms rather than more specifically as in effect provided for in § 5(e) of the committee print by adoption of portions of the Mineral Leasing Act of 1920 as amended * * *. If the authority to promulgate regulations on these subjects is cast in general terms, the Department would be free to incorporate the provisions of the Mineral Leasing Act on the same subjects, but would also be free to modify them as circumstances peculiar to operations and actual experience in administering a leasing program in the submerged lands made appropriate.[23]

At the end of this letter, the Secretary submitted a proposed draft of a revised version of § 5. Except for two minor changes,[24] the Senate adopted this version verbatim. Although the Senate later abandoned S. 1901, it incorporated this version of § 5 into its amendments to H.R. 5134. The Conference Report adopted the Senate's amendment.[25] This became § 5 of the final act, as quoted above. The Secretary thus obtained precisely the broad, flexible authority he had requested.

---

[18] 43 U.S.C. § 1301 *et seq.*, 37 Stat. 29 (May 22, 1953).

[19] H.R. Rep. No. 413, 83rd Cong., 1st Sess. 10 (1953).

[20] In 1953, § 17(b) [now § 17(j), 30 U.S.C. § 226(j)] of the MLA provided in pertinent part as follows: "The Secretary may provide that oil and gas leases hereafter issued * * * shall contain a provision requiring the lessee to operate under such a reasonable cooperative or unit plan, and he may prescribe such a plan under which such lessee shall operate * * * ." Act of Aug. 8, 1946, P.L. 79–696, § 5, 60 Stat. 952.

[21] 99 Cong. Rec. 4908 (May 14, 1953).

[22] S. Rep. No. 411, 83rd Cong., 1st Sess. 24 (1953).

[23] *Id.* at 28.

[24] The Senate added the clause "the assignment or relinquishment of leases" to the list of subjects within the Secretary's rulemaking authority. The House added a provision for state-federal cooperation. Senator Cordon explained these additions. *See* 99 Cong. Rec. 10472 (July 30, 1953).

This legislative history makes clear that the Secretary is authorized to modify and incorporate the provisions of the Mineral Leasing Act, as they existed in 1953 when the OCS Lands Act was passed, into OCS leasing regulations. Therefore, since the Mineral Leasing Act provided for compulsory unitization in 1953, the Secretary is also duly authorized to require compulsory unitization of OCS leases, when it is deemed necessary to prevent waste, conserve OCS resources, protect correlative rights, or further any other purposes of the OCS Lands Act. Such authority has been recognized and reflected in the Department's lease forms since the initiation of OCS leasing in 1953. *See* BLM Form 3300-1, § 16 (Sept. 1978).

B. *The Secretary Is Not Authorized to Require Segregation of Partially Unitized OCS Leases*

The Department has assumed that this broad grant of regulatory authority in § 5 of the Act also enables the Secretary lawfully to require the segregation of partially unitized OCS leases. This assumption is incorrect for several reasons.

Segregation is distinguishable from most types of regulatory measures. All such measures generally result in some additional burdens on lessees. Segregation, however, essentially restructures a lessee's actual legal rights and obligations, as agreed upon in the original lease. Sec. 8 of the OCS Lands Act, as well as the language of each lease, specifies the terms of the lease, including the length of duration or "term." Sec. 8 makes clear that production, drilling, or reworking on "the area" will be the basis for extending the habendum clause during the secondary term. 43 U.S.C. § 1337(a)(2). Initially, "the area" is clearly understood by both parties to refer to the lease tract as a whole. Segregation in effect rescinds the original lease and creates two new, distinct leases. "The area" then becomes two distinct areas, with distinct requirements for rent, royalties, and the extent of production needed to prolong the secondary term of each segregated lease. The original lease term is thus destroyed, and the lessee is subjected to a different legal relationship from the one he originally entered into. Therefore, segregation results in a fundamental modification of the lessee's original leasehold interest.

As noted above, this Department has consistently held that the Secretary is not authorized to segregate onshore oil and gas leases issued under the Mineral Leasing Act, except as that act expressly provides for such authority. Prior to 1954, partially unitized onshore leases were segregated for administrative purposes, but it was recognized that such segregation could have no substantive legal effects, since the Mineral Leasing Act contained no authority to create two separate leases from a single lease and thus modify the original lease term. Opinion of the Chief Counsel, Bureau of Land Management, *Extension of Oil and Gas Lease Term by Production*, GFS BLM–1953–175. *Gulf Oil Co.*, GFS BLM–1964–50. An amendment of the Act was necessary, in the Secretary's judgment, to permit actual segregation of the habendum clause of a lease.[26]

---

[25] H.R. Rep. No. 1031, 83rd Cong., 1st Sess. (1953).

In 1954, at the Department's request, Congress amended the Mineral Leasing Act to expressly require segregation by the Secretary of any onshore lease which is partially committed to a unit agreement.[27] This authorization has been strictly construed. It has been held insufficient to permit segregation of a portion of a unitized lease which is *eliminated* from a unit plan (due to contraction of the unit area), since the Act speaks only of lands "committed" to such plans. *Solicitor's Opinion*, M–36592 (1960). *Continental Oil Co.*, 70 I.D. 473, 474 (1963). Therefore, the authority to segregate onshore leases must be clear. It will not be presumed or extrapolated from a general grant of regulatory authority.

This recognized need for clear legislative authority to segregate partially unitized onshore leases is equally applicable to OCS leases. Neither the terms nor the legislative history of the OCS Lands Act indicates, however, that such authority was provided for in that act. The language as well as the history of the Act, including Secretary McKay's letter to Senator Cordon, does not contain a single reference to segregation. Moreover, at the time the OCS Lands Act was being considered in 1953, the Mineral Leasing Act did not yet authorize the Secretary to segregate onshore leases. Secretary McKay's letter and the other legislative history noted above indicate that the Department was intended to be free to "incorporate and modify" the *then-existing* provisions of the Mineral Leasing Act into its OCS regulations. Since the segregation provisions of the Mineral Leasing Act were non-existent at that time, there is no evidence that either Congress or the Department intended or contemplated that the Secretary's OCS regulatory authority would encompass the power to segregate partially unitized OCS leases. Assumption of such power would clearly do more than merely "modify" or adapt the then-existing provisions of the Mineral Leasing Act, since both Congress and the Department felt a legislative amendment to those provisions was necessary to permit segregation of onshore leases. Therefore, the broad, general language of § 5 of the OCS Lands Act is not sufficient to provide the clear authority which is necessary to permit segregation of partially unitized OCS leases.

---

[26] In the Department's Apr. 20, 1954 report to the Senate on S. 2380 and S. 2382, proposed amendments to the Mineral Leasing Act, the Secretary recommended the addition of an amendment which would expressly provide the authority to segregate partially unitized onshore leases. S. Rep. No. 1609 83rd Cong., 2nd Sess. 3 (1954). *See also* Hearing on S. 2380 before Senate Subcommittee on Public Lands, 83rd Cong., 2d Sess. 40 (May 12, 1954).

[27] Act of July 29, 1954, P.L. 83–555, 68 Stat. 585.

The decision of the Department concerning segregation of OCS leases by partial *assignment* is distinguishable from this situation. In *Continental Oil Co.*, 74 I.D. 229, 237 (1967) the Assistant Secretary stated that, when only part of an OCS lease is assigned to another party, the part assigned and the part retained may be segregated into separate leases under which each lessee is individually accountable for compliance with all the terms of the original lease. Segregation due to partial assignment is permissible, however, because the Mineral Leasing Act expressly authorized such segregation at the time the OCS Lands Act was passed.[28] As discussed above, § 5 of the OCS Lands Act was intended to authorize the Secretary to incorporate and modify the existing provisions of the Mineral Leasing Act into the Department's OCS regulations. Since segregation of partially *assigned* onshore leases was clearly provided for in 1953, the Secretary is authorized to modify and incorporate that practice into OCS leasing procedures as the peculiar circumstances of OCS leasing make appropriate. *Id.* at 233–34. However, no similar provision then existed in the Mineral Leasing Act regarding segregation of partially *unitized* leases. Nor is there any other evidence that comparable authority for such segregation was intended or contemplated in the OCS Lands Act. Therefore, the *Continental Oil Co.* case is inapplicable to the issue at hand.

It is emphasized that not every OCS regulatory measure or practice that the Secretary may wish to adopt need be explicitly provided for in either the Mineral Leasing Act or the OCS Lands Act itself. Sec. 5 of the latter act makes clear that the OCS regulations prescribed under that section shall include "but *not be limited to*," the subjects there enumerated. 43 U.S.C. § 1334(a). The original, 1953 version of § 5 also emphasized that the listing of specific subjects to be regulated was intended to be "without limiting the generality of the foregoing [regulatory authority] provisions." Secretary McKay's 1953 letter suggests that those listed subjects referred to the measures which are specifically outlined in the Mineral Leasing Act. Therefore, the Secretary generally is free under § 5 to adopt any other, unspecified regulations which he determines to be necessary and proper to prevent waste, conserve natural resources, protect correlative rights, or carry out the leasing provisions of the OCS Lands Act. 43 U.S.C. § 1334 (a). However, since segregation actually creates two new leases from a single lease and thus fundamentally modifies a lessees' legal rights and obligations, and since the Department has consistently required clear legislative authorization for such segregation, the general language of § 5 may not properly be considered adequate authority to permit segregation of partially unitized OCS leases. The new OCS segregation regulations are thus invalid and must be revised.

---

[28] In 1953, § 30(a) of the MLA provided in pertinent part as follows: "* * * [A]ny oil or gas lease * * * may be assigned * * *, as to all or part of the acreage included therein * * *. *Any partial assignment of any lease shall segregate the assigned and retained portions thereof*, and as above provided, release and discharge the assignor from all obligations thereafter accruing with respect to the assigned lands; * * *." (Italics added). Act of Aug. 8, 1946, 60 Stat. 955.

It is also noted that the grandfather clause of the new rules provides that any lease issued before May 2, 1980 may not be segregated without the lessee's consent. 30 C.F.R. 250.50(j). Since the Secretary is not authorized to require compulsory segregation of future leases, it follows that he cannot condition approval of any unit agreement or development plan for any existing or future lease upon the lessee's consent to segregation.

C. *The Secretary Is Authorized to Require the Prompt and Efficient Exploration and Development of the Entire Area of OCS Leases*

The basic purpose of the invalid segregation rules is to encourage the prompt and efficient development of each OCS lease in its entirety. Segregation accomplishes this by forcing a lessee either to develop or to forfeit the non-unitized portion of each lease. Segregation is not necessary, however, to achieve this objective. The Secretary is cur-
rently authorized by statute, reg
lations, and the terms of each OC
lease to demand the prompt and
ficient exploration and develo
ment of each OCS lease area as
whole. In addition, to the exte
each lease is silent regarding t
rate and extent of development
quired of the lessee, implied co
nants of reasonably diligent dev
opment will be recognized whi
are legally enforceable by t
Secretary.

One of the stated policies of t
OCS Lands Act is to make the out
continental shelf available "for *e*
peditious and orderly develo
ment." 43 U.S.C. § 1332(3). To fu
fill this policy the Act requires t
Secretary to prescribe regulatio
which include provisions "for t
prompt and efficient explorati
and development of a lease area."
U.S.C. § 1334(a)(7). This autho
ity is extremely broad. The Secr
tary cannot breach vested contra
tual rights under the guise of ensu
ing prompt development, if the l
see is already diligently developi
the entire lease area. *See Sun C*
Co. v. *United States*, 572 F.2d 78
814 (1978). Nor is this general a
thority sufficient to permit segreg
tion of partially unitized leases,
discussed above. Otherwise, ho
ever, the Secretary may adopt a
reasonable regulatory measu
which are genuinely calculated
assure the prompt and efficient e
ploration and development of OC
leases.

Several existing regulations n
authorize the Director of the U.
Geological Survey to require dri

ing or development on specific portions of OCS leases. All lessees are required to diligently drill and produce such wells as are necessary to protect the United States from loss by reason of production on other properties. 30 C.F.R. 250.33(a). In addition, lessees must:

> * * * *promptly* drill and produce such other wells as the supervisor may *reasonably* require in order that the lease may be *properly* and *timely* developed and produced in accordance with good operating practices. (Italics added). 30 C.F.R. 250.33(b).

Each lessee must also obtain approval of an exploration plan and a detailed development plan before any exploration, development, or production activities may occur on a lease. 43 U.S.C. §§ 1340 and 1351. After approval, no work may be done on a lease except in accordance with the respective plans. Both plans must identify, to the extent possible, all potential oil and gas accumulations, the number and location of proposed wells, and the time schedule for drilling.[29] The development plan must also provide for the "effective and efficient development and production" of certain oil and gas deposits.[30] The Director is required to periodically review the activities being conducted under both plans, and he has broad discretion to revise such plans after review.[31] Under this supervised planning scheme, the Director may initially disapprove or later revise these plans unless they contain adequate provisions for the prompt and efficient exploration and development of all portions of each lease. If the lessee fails to submit or comply with an approved or revised plan, the lease may be canceled. 43 U.S.C. §§ 1340(c)(1) and 1351(j). Moreover, if a lessee is found not to be meeting the above or any other "due diligence" requirements on one lease, he is disqualified from bidding on all other leases. 43 U.S.C. § 1337(d). Each lease is conditioned by statute upon compliance with these and all other existing or future OCS regulations. 43 U.S.C. § 1334(b). Noncompliance with any regulation or lease term is grounds for cancellation. 43 U.S.C. §§ 1334(c) and (d).

The standard lease used by the Department, BLM Form 3300-1, § 10 (Sept. 1978), also provides that:

> * * * the Lessee shall drill such wells and produce at such rate as the Lessor may require in order that the leased area *or any part thereof* may be *properly and timely* developed and produced in accordance with sound operating principles. (Italics added).

In addition, each lease itself expressly incorporates and is subject to all existing and future OCS regulations. Therefore, the Secretary or the Director can require the prompt and efficient exploration and development of the non-unitized or any other specific portion of an OCS lease pursuant either to the above regulations or to the terms of each lease. Exercise of such authority may serve the same purpose as would segregation.

---

[29] 30 C.F.R. 250.34-1(a)(1) and 34-2(a)(1), 44 Fed. Reg. 53693-98 (Sept. 14, 1979).

[30] 30 C.F.R. 250.34-2(a)(1).

[31] 30 C.F.R. 250.34-1(j) and 34-2(l).

It is also noted that, to the extent any OCS lease or incorporated development plan or regulation is silent regarding the rate, extent, or location of exploration or development required on a lease tract, the common-law will recognize implied covenants of diligent development by the lessee. Such covenants include the obligations to explore within a reasonable time, to conduct further, reasonable development after production is obtained, and to diligently operate all wells.[32] The diligence required of the lessee to develop the lease further is that of a "prudent operator," *i.e.*, "whatever, in the circumstances, would be expected of operators of ordinary prudence, having regard to the interest of both lessor and lessee." *Brewster* v. *Lanyon Zinc Co.*, 140 F. 801, 814 (8th Cir. 1905). What constitutes diligent development depends upon a variety of facts and circumstances which will vary in each case. *Id.* The covenants apply to the entire lease area and may be enforced on both the unitized and non-unitized portions of a lease. Breach of such covenants is grounds for cancellation of the entire lease. *Sauder* v. *Mid-Continent Petroleum Corp.*, 292 U.S. 272, 281 (1934). Therefore, in the absence of any of the above express provisions within or incorporated into an OCS lease, the Secretary may invoke and enforce these implied covenants t demand the prompt and efficien exploration and development of th entire lease area. Since such covenants will not be implied where a express provision is made regarding the required rate and extent o development, this theory wil rarely be applicable to OCS leases *Brewster* v. *Lanyon Zinc Co.*, *supr* at 814. This alternative theory ensures, however, that the Secretar can in all cases require the diligen development of the entire area o an OCS lease, even if the expres terms of the statute, lease, or regulations fail to so provide.

CLYDE O. MARTZ
Solicitor

UNITED STATES
v.
W. S. WOOD ET AL.

51 IBLA 301

Decided *December 18, 198*

Appeal from a decision of Administrative Law Judge E. Kendall Clark holding null and void certain minin claims in Whiskeytown-Shasta-Trinit National Recreation Area, Shast National Forest. CA-2863.

Affirmed.

1. Mining Claims: Discovery: Generally

The discovery of a "valuable minera deposit" has been made where mineral have been found and the evidence is o such a character that a person of ordi nary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine.

---

[32] *See generally* Brown, 5 The Law of Oil and Gas § 16.02 (1967 ed.).

2. Mining Claims: Discovery: Generally

Evidence which will not justify development of a claim but may justify further exploration is not sufficient to establish that a discovery of a valuable mineral deposit has been made.

3. Mining Claims: Discovery: Generally—Mining Claims: Withdrawn Land—Withdrawals and Reservations: Effect of

Where land is withdrawn from the operation of the mining laws subsequent to the location of a mining claim, the validity of the claim cannot be recognized unless the claim was supported by a valid discovery at the time of the withdrawal. In addition, even though there may have been a proper discovery at the time of a withdrawal or at some other time in the past, a mining claim cannot be considered valid unless the claim is at present supported by a sufficient discovery. The loss of the discovery, either through exhaustion of the minerals, changes in economic conditions, or other circumstances, results in the loss of the location.

4. Administrative Procedure: Burden of Proof—Mining Claims: Contests—Mining Claims: Determination of Validity

When the United States contests a mining claim it has by practice assumed only the burden of going forward with sufficient evidence to establish a prima facie case on the charges in the contest complaint; the burden then shifts to the contestee to refute by a preponderance of the evidence, the Government's case.

5. Administrative Procedure: Burden of Proof—Mining Claims: Contests—Mining Claims: Determination of Validity

The United States has established a prima facie case of the invalidity of a mining claim when a qualified Government mining examiner testifies that he has examined the claim and found the mineral values insufficient to support the discovery of a valuable deposit.

6. Secretary of the Interior

The Secretary of the Interior is authorized, and is under a duty to consider and determine what lands are public lands of the United States, and after having made that determination the Secretary has the authority to determine the validity of mining claims on any public lands of the United States after adequate notice and opportunity for a hearing. A mining contest may be initiated under the authority of the Secretary of the Interior by the Bureau of Land Management at the behest of the Forest Service and prosecuted by counsel employed by the Department of Agriculture, with Forest Service employees as witnesses, where such action is in accordance with a Memorandum of Understanding between the agencies.

APPEARANCES: William B. Murray, Esq., Portland, Oregon, for appellants; Charles F. Lawrence, Esq., U.S. Department of Agriculture, San Francisco, California, for contestant.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

INTERIOR BOARD OF LAND APPEALS

Appeal has been taken from the decision of June 24, 1980, by Administrative Law Judge E. Kendall Clarke, wherein he held certain unpatented lode mining claims [1] in the Shasta National Forest to be null and void because the contestees [2] in Contest CA 2883 had failed to prove a valid discovery as to each and every claim. The claims at issue occupy lands in the Whiskeytown-Shasta-Trinity National Recreation Area, a site withdrawn from location, entry, and patent under the United States mining laws by sec. 6 of the Act of Nov. 8, 1965, 16 U.S.C. § 460q–5 (1976).

A contest complaint was first issued on July 3, 1975, charging as follows as to the claims at issue:

> A. There are not presently disclosed within the boundaries of the mining claims minerals of a variety subject to the mining laws, sufficient in quantity, quality, and value to constitute a discovery.
>
> B. The land embraced within the claims is nonmineral in character.
>
> C. The land embraced within the claims is not held in good faith for mining purposes.
>
> D. The $100 worth of labor or improvements required by 30 U.S. Code, Section 28, has not been performed or made on or for such claims.

In Contest CA 2883, *United States* v. *Estate of W. R. Wood, a.k.a. Walter R. Wood*, Rodney Wood as Administrator of the Estate of W. R. Wood, deceased, denied the charges, and the matter came on for a hearing before Administrative Law Judge Dean F. Ratzman. Following the hearing Judge Ratzman declared all the claims null and void for lack of discovery. Following appeal to this Board Judge Ratzman's decision was affirmed insofar as it related to the interests of B. Victor Wood and Rodney Wood, but reversed insofar as it purported to affect the interest of W. S. Wood and any other heirs at law of Walter R. Wood. *United States* v. *Estate of W. R. Wood*, 34 IBLA 44 (1978). At the hearing before Judge Ratzman it was shown that the estate of Walter R. Wood had never been probated and that Rodney Wood was not administrator of the estate as no administrator, executor, or personal representative had ever been appointed to supervise the descent of Walter R. Wood's property. As both B. Victor Wood and Rodney Wood appeared at the hearing and contested the merits of the case as heirs at law of W. R. Wood, the decision declaring their interests null and void was affirmed. Although present at the hearing, Walter S. Wood did not participate in the proceeding.

Thereafter, following a renewed request from the Forest Service, U.S. Department of Agriculture, the California State Office, Bureau of Land Management (BLM), reissued on Jan. 9, 1979, a complaint in contest CA 2883 and served this pleading by publication under the styling, *United States* v. *W. S. Wood, a.k.a. Walter S. Wood, heirs and devisees of W. R. Wood, a.k.a. Walter R. Wood, deceased, their heirs, personal or legal representatives, or assigns*, charging exactly as in the original contest against the identical unpatented mining claims.

---

[1] The Fox Mine, formerly known as January; Candaleria Copper Mine, a.k.a. Canadalana; E. Valena Mine, a.k.a. Evelena Claim and Evalena; Triangler Quartz Mining Claim; Mangenes No. 2 Mine; White-House Quartz Mining Claim, a.k.a. White Horse; Duck Mine; Gass Mine; Banar No. 2 Mine, a.k.a. Baner No. 2 and Banner No. 2; and Thy Angler Clame, a.k.a. Thry Angler Mine Quartz Mining Claims, situated in the W½ sec. 1, T. 33 N., R. 4 W., Mount Diablo meridian, Shasta County, California, within the Shasta National Forest and the Whiskeytown-Shasta-Trinity National Recreation Area.

[2] The complaint which led to the instant decision of Judge Clarke is styled *United States v. W. S. Wood, a.k.a. Walter S. Wood; Unknown Heirs and Devisees of W. R. Wood, a.k.a. Walter R. Wood, Deceased; and Unknown Owners.*

Denial of all of the statements in the complaint was made by Walter S. Wood, B. Victor Wood, and Rodney Wood. The State Office accepted the answer by Walter S. Wood, but advised the other respondents that their interests in the subject claims had been declared null and void in *United States* v. *Estate of W. R. Wood*, *supra*. The matter came on for a hearing before Administrative Law Judge E. Kendall Clarke on Oct. 31, 1979, at Sacramento, California.

We have reviewed the record established at the hearing and conclude that Judge Clarke has accurately reported the material evidence and testimony therein given in his decision to declare the aforementioned mining claims null and void. We affirm.

Appellants contend that the positive prudent man opinion of their witness, Tibor Klobusicky, being supported by testimony of probative facts, preponderates over the negative prudent man opinion of Emmett Ball, the Government's witness. Appellants further argue that the Forest Service had no authority to initiate the prosecution of this case and that the U.S. Department of the Interior has no jurisdiction over lands of the State of California. Finally, appellants request that this Board rule on each of 50 proposed findings of fact.

The Judge summed up the evidence and testimony as follows:

> Mr. Emmett B. Ball, Jr., a mining engineer with the United States Forest Service, testified he had given testimony at the hearing involving these same ten lode mining claims on January 19, 1977. (Tr. 10). He had examined the claims again in April, 1979. No changes were detected on the claim. He took a grab sample from the Mangenes No 2 claim and had it assayed. (Tr. 17). The assay report disclosed .06% managanese and a major amount of iron. (Tr. 20). Iron gossan exposures were seen on the Mangenes No 2 claim. (Tr. 26). He examined all ten of the claims in issue. (Tr. 29).
>
> Sample No. 2465 was taken from the Gass claim. (Ex. D). A spectrographic analysis revealed the major constituent was silicon. (Ex. H–1, Tr. 33). Sample No. 2466 was taken from the claim boundaries between the Evalena and Triangler claims. The spectrographic analysis disclosed silicon as the major mineral. (Ex. H–2 Tr. 34). Negligible amounts of gold were recovered. (Ex. H–5). Sample No. 2467 was taken from the Mangenes No 2 claim and it showed the major mineral as silicon. (Ex. H–3). Silicon was also the major constituent found in Sample No. 2468 taken from the south end of the Mangenes No 2 claim. (Tr. 35, Ex. H–4). In addition, a chemical assay of Sample No. 2468 revealed only .07% manganese. (Tr. 37, Ex. H–5). Sample No. 2474 was taken from the Candaleria claim and the spectrographic analysis found the major constituents to be silicon and iron. (Ex. H–7). A fire assay of this sample showed only .015

oz. of gold per ton. (Ex. H–6). No other points were sampled. (Tr. 42). In Mr. Ball's opinion, a prudent person would not spend time mining any of the claims for iron or manganese. (Tr. 47).

In order to develop an economically viable mining venture to extract iron ore, it would take millions of tons of ore reserves and millions of dollars to construct a processing plant. (Tr. 52). The mining claimants initially expressed an interest in mining for manganese, gold, silver and copper. (Tr. 54).

The transcript of the hearing held on January 19, 1977, which contained the testimony of Emmett B. Ball, was entered into the record. In essence, Mr. Ball believes that there are no valuable mineral deposits exposed on any of the claims that would justify a prudent man in developing any of the claims. He examined all the claims but took samples on only five of them. Mr. Ball found two houses and a lot of "junk cars." No mining equipment was found but two old adits were on the claims. One was caved in and the other was being used as a root celler. The land was not used for mining. (Tr. 25). No significant amounts of manganese or iron were disclosed in the spectrographic analysis.

Mr. Walter S. Wood, a mining claimant, testified he has milled thousands of tons of ore during his mining career. He was a research metallurgist. (Tr. 62). He found hematite on the claims. (Tr. 64). Manganese is restricted to the Mangenes No 2 claim. (Tr. 66). Mr. Wood has also found gold and silver on the claims. (Tr. 67). However, he does not recall from where it was collected. (Tr. 68). Diamond drill exploratory holes were placed on several claims to depths of 140 feet. Hematite iron was found. (Tr. 71). However, these holes were not on any of the claims subject to this contest. (Tr. 72). Surface cuts were also made but they were not on any of the contested claims.

On cross-examination, Mr. Wood stated that after he had core drilled on several locations, the findings encouraged him to proceed to obtain further financial backing. However, he did not name any particular individuals who would be interested in developing the claims. (Tr. 79).

Tibor Klobusicky, a registered professional engineer and consulting geologist, testified on behalf of the mining claimant. (Tr. 82). He is a qualified mining engineer with extensive experience in mining for manganese and iron. (Tr. 84). As a member of the Bunker Hill Mining Company's exploration staff, he spent two years investigating iron ore deposits in the Redding, California area. (Tr. 85). These iron ore deposits were known as the Lakeshore Mines and they are a mile northwest of the Wood family claims. The Lakeshore deposits were abondoned because other high grade ore deposits were discovered in Australia and Brazil. (Tr. 91).

Mr. Klobusicky examined the iron deposits in the western half of Section one in which the Wood family claims are located. Examinations were made in February and April of 1979. The February examination concentrated on manganese development and the April examination on iron ore potential. (Tr. 92). Five samples of iron ore material were taken in April. (Tr. 93). The arithemetic average of these five samples was 39.6% iron. (Tr. 97). In Mr. Klobusicky's opinion, this is a commercial grade of iron ore. The price of iron as of the date of the hearing was 64 [cents] per percent per ton. (Tr. 99). Mr. Klobusicky could not determine whether the iron ore on the claims could be marketed at a profit. (Tr. 100).

Mr. Klobusicky took four samples from the manganese structure found on the Mangenes No 2 claim. (Tr. 107). Sample No. 1176 revealed 16 percent manganese (See Ex. 18–A). Sample No. [1177], taken 232 feet southwest of Sample No. 1176 contained 16.9% manganese. Approximately 128 feet away, Sample No. [1178] assayed 6.9% manganese. At 85 feet away from Sample [1178], Sample No. 1179 disclosed only .8% manganese. (Tr. 108). He estimated a manganese reserve of 55,000 tons at an average grade of 13.2% (Tr. 108).

When asked whether a prudent man would develop the ten contested Wood family claims, Mr. Klobusicky believed he presently could not make such a determination. He believed more development work was needed. Significantly, he conceded that most of his sampling work took place outside of the Wood claims although they were very close to those claims. By geological inference, he projected the mineral deposits onto the Wood claims. (Tr. 110). Nonetheless, he would encourage a prudent man to develop these claims. (Tr. 111).

Upon further questioning, Mr. Klobusicky testified he recommended that the Wood family conduct further exploration and delineation of the iron and manganese deposits on the claims. (Tr. 114). More information about the ore deposits is needed. (Tr. 116). Mr. Klobusicky could not state that he had seen a sufficient tonnage of manganese to support a practical operation. (Tr. 118). Although he believed that he took four samples from the Mangenes No 2 claim, he was not sure where his sample points were in relation to the claims. He was told that he was on the Mangenes No 2 claim and therefore assumed his sample points were on that claim. (Tr. 120). He had no independent knowledge of where the sample points were since he did not locate any claim corners or do any surveying. (Tr. 121). He recommends that future development be conducted away from the Mangenes No 2 claim. (Tr. 121). Before mining for manganese, a 25% to 30% grade of manganese ore should be found. (Tr. 136).

Two reports on the Deep Pit Mine (Ex. 17 and Ex. 18) prepared by Mr. Klobusicky were admitted into evidence. A report dated September 10, 1979 evaluated the iron ore potential of the gossan zones in the area. No accurate outline of the gossan zones were made although a map of the estimated zone was prepared. Detailed exploration, which includes drilling, is needed to determine the extent of the iron ore deposit. Mr. Klobusicky's estimates included lands outside of the Wood claims.

It is well established that the *sine qua non* for a valid mining claim located on public lands of the United States is discovery, as the location of a mining claim conveys to the claimant no rights against the United States until there is shown a discovery of a valuable mineral deposit within the limits of the claim. 30 U.S.C. § 23 (1976). *Best* v. *Humboldt Placer Mining Co.*, 371 U.S. 334 (1963); *Converse* v. *Udall*, 399 F.2d 616 (9th Cir. 1968), *cert. denied*, 393 U.S. 1025 (1969). Implementation of this standard has been left to the Executive and the Courts. *Converse* v. *Udall*, *supra* at 619.

[1] The Supreme Court, in *Chrisman* v. *Miller*, 197 U.S. 313 (1905), approved the so-called "prudent man test" of discovery enunciated by the Department in *Castle* v. *Womble*, 19 L.D. 455, 457 (1894), that discovery has been achieved when one finds a mineral deposit of such quantity and quality that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. The Court has followed this decision consistently since that time. *Accord*, *United States* v. *Coleman*, 390 U.S. 599 (1968); *Best* v. *Humboldt Placer Mining Co.*, *supra*; *Cameron* v. *United States*, 252 U.S. 450 (1920); *Cole* v. *Ralph*, 252 U.S. 286

(1920). *See also Multiple Use, Inc.* v. *Morton*, 504 F.2d 448 (9th Cir. 1974); *Adams* v. *United States*, 318 F.2d 861 (9th Cir. 1963); *Lange* v. *Robinson*, 148 F. 799 (9th Cir. 1906). The prudent man test has been complemented by the "marketability test" requiring a claimant to show that the mineral can be extracted, removed, and marketed at a profit. *United States* v. *Coleman, supra; Converse* v. *Udall, supra.*

[2] Mineralization that only warrants further prospecting or exploration in an effort to ascertain whether sufficient mineralization might be found to justify mining or development does not constitute a valuable mineral deposit. A valuable mineral deposit has not been found simply because the facts might warrant a search for such a deposit. *Barton* v. *Morton*, 498 F. 2d 288 (9th Cir. 1974); *United States* v. *Porter*, 37 IBLA 313 (1978). Similarly, it is not enough that the mineral values exposed justify further exploration to determine whether actual mining operations might be warranted. In order to have a valid mining claim, valuable minerals must be exposed in sufficient quantities to justify development of the claim through actual mining operations. *United States* v. *Marion*, 37 IBLA 68 (1978).

Geological inference may only be relied upon in evaluating the extent and potential value of a particular exposed mineral deposit under the prudent man test of discovery and may not be employed as a substitute for the actual finding of a mineral deposit within the limits of the claim. *United States* v. *Bechthold*, 25 IBLA 77 (1976). Geological inference alone cannot support a determination under the mining laws that a discovery of a valuable mineral deposit has been made. The claimant must actually expose a valuable mineral deposit physically within the limits of the claim. *United States* v. *Walls*, 30 IBLA 333 (1977). Evidence necessary to demonstrate the existence of an ore body or bodies sufficient to warrant a prudent person to develop a valuable mine may not be shown by geologic inference. Similarly, such inference may not be used to infer mineralization throughout an area where the evidence shows a few spots of high mineralization, but the mineralized areas are spotty and discontinuous. *United States* v. *Edeline*, 39 IBLA 236 (1979).

[3] When land is closed to location under the mining laws subsequent to the location of a mining claim, the claim cannot be recognized as valid unless all requirements of the mining laws, including discovery of a valuable mineral deposit, were met at the time of the withdrawal and the claim presently, *i.e.*, at the time of the hearing, meets the requirements of the law. *United States* v. *Porter*, *supra*; *United States* v. *Netherlin*, 33 IBLA 86 (1977). Where land occupied by a mining claim has been withdrawn from operation of the mining laws, the validity of the claim must be tested by the value of the mineral deposit as of the date of the with-

drawal, as well as of the date of the hearing. *United States* v. *Chappell*, 42 IBLA 74 (1979); *United States* v. *Garner*, 30 IBLA 42 (1977). Even though there may have been a proper discovery at the time of a withdrawal or at some other time in the past, a mining claim cannot be considered valid unless the claim is at present supported by a sufficient discovery. The loss of the discovery, either through exhaustion of the minerals, changes in economic conditions, or other circumstances, results in the loss of the location. *United States* v. *Wichner*, 35 IBLA 240 (1978).

[4] When the United States contests a mining claim, it has assumed only the burden of going forward with sufficient evidence to establish a prima facia case on the charges in the contest complaint; the burden then shifts to the contestee to refute, by a preponderance of the evidence, the Government's case. *Hallenbeck* v. *Kleppe*, 590 F. 2d 852 (10th Cir. 1979); *United States* v. *Springer*, 491 F.2d 239 (9th Cir. 1974), *cert. denied*, 419 U.S. 834 (1974); *Foster* v. *Seaton*, 271 F.2d 836 (D.C. Cir. 1959).

[5] The United States has established a prima facie case of the invalidity of a mining claim when a qualified Government mining engineer testifies that he has examined the claim and found the mineral values insufficient to support the discovery of a valuable mineral deposit. *United States* v. *Taylor*, 25 IBLA 21 (1976).

It is the duty of mining claimants whose claim is being contested to keep discovery points available for inspection by Government mineral examiners. Mineral examiners have no affirmative duty to search for indications of a discovery on a mining claim, nor do they have to go beyond examining the discovery points of the claimant. The function of the Government's examiners is to examine the discovery points made available by the claimants and to verify, if possible, the claimed discovery. *United States* v. *Bryce*, 13 IBLA 340 (1973). Where a claimant fails to keep his discovery points open and safely available for sampling by the Government's examiner, or declines to accompany the examiner on the claim, he assumes the risk that the Government examiner will be unable to verify the alleged discovery of a valuable mineral deposit. *United States* v. *Russell*, 40 IBLA 309 (1979), *aff'd sub nom. Russell* v. *Peterson*, Civ. No. 79-949 (D. Or., June 23, 1980); *United States* v. *Knecht*, 39 IBLA 8 (1979); *United States* v. *Bechthold*, *supra*.

Appellants argue that the Forest Service, U.S. Department of Agriculture, had no authority to initiate this contest and further contend that the Department of the Interior has no jurisdiction over lands of the State of California. Appellants seem to be suggesting that title to the lands in the unpatented claims resides with the State of California. It is difficult to consider this argument as other than facetious. All land embraced within California was ceded to the United States by Mexico under the Treaty of Guadalupe Hidalgo, Feb. 2, 1848, 9 Stat. 922. California was admitted into the Union on Sept. 9, 1850, 9 Stat. 452.[3]

The official land status records in the BLM State Office, Sacramento, California, show that as to the W½ sec. 1, T. 33 N., R. 4 W., Mount Diablo meridian, the following actions have occurred:

SW¼ was withdrawn for Power Project No. 397, March 8, 1923;
E½ SW¼ was withdrawn under the First Form for the Central Valley Project, July 29, 1936;
W½ SW¼ was withdrawn under the First Form for the Central Valley Project, July 16, 1947;
W½ was placed in the Shasta National Forest by the Act of March 19, 1948, 62 Stat. 83;
W½ was withdrawn from location, entry, and patent under the United States mining laws and placed in the Whiskeytown-Shasta-Trinity National Recreation Area by the Act of November 8, 1965, 16 U.S.C. § 460q-5 (1976).

None of the recorded actions affecting the W½ sec. 1, T. 33 N., R. 4 W., have removed the land from the sovereign jurisdiction of the United States Government.

[6] The organization and duties of the Department of the Interior are set out in 43 U.S.C. §§ 1451-1457 (1976). The Department of the Interior has plenary authority over administration of public lands, including mineral lands. *Best* v. *Humboldt Placer Mining Co.*, *supra*. The Secretary of the Interior is the supervising agent of the Government to do justice to all claimants and to preserve the rights of the people of the United States. *Knight* v. *United States Land Association*, 142 U.S. 161 (1891). The Secretary of the Interior has, under a grant of authority to supervise public business on public lands, including mines, the power to initiate contests through the subordinate Bureau of Land Management in order to see that valid claims are recognized, invalid ones eliminated, and the rights of the public preserved. *Duguid* v. *Best*, 291 F.2d 235 (9th Cir. 1961), *cert. denied*, 372 U.S. 906 (1963).

Pursuant to a memorandum of understanding, effective May 3, 1957, between the Forest Service, Department of Agriculture, and the Bureau of Land Management, Department of the Interior, the Regional Forester will recommend initiation of contests against unpatented mining claims within national forests. Upon determining that the elements of a contest are present, BLM will issue the contest complaint stating the charges recommended by the Forest Service. Hearings will be held before Administrative Law Judges of the Department of the Interior, appointed pursuant to 5 U.S.C. § 3105 (1976), and the Government's case will be presented by a member of the Office of the General Counsel, Department of Agriculture. A mining claim within a national forest may be contested by the Forest Service at any time prior to issuance of patent. 43 CFR 1862.4.

---

[3] Sec. 3 of the Act of Sept. 9, 1850, *supra*, states in part:

"Sec. 3. *And be it further enacted*, That the said State of California is admitted into the Union upon the express condition that the people of said State, through their legislature or otherwise, shall never interfere with the primary disposal of the public lands within its limits, and shall pass no law and do no act whereby the title of the United States to, and right to dispose of, the same shall be impaired or questioned."

See California v. *United States*, 438 U.S. 645, 654 (1978); *Donnelly* v. *United States*, 228 U.S. 243, 259 (1913).

Although the administration of the national forests is vested in the Secretary of Agriculture, the Secretary of the Interior has the responsibility of determining the validity of mining claims in the national forests and providing the administrative forum by which that Department may determine its right to possession, control, and administration of lands on which mining claims have been located within a national forest. *United States* v. *Bergdal*, 74 I.D. 245 (1967).

The Secretary of the Interior has the authority to determine the validity of mining claims on any public lands of the United States after adequate notice and opportunity for a hearing. A mining claim contest may be initiated under the authority of the Secretary of the Interior by the Bureau of Land Management at the behest of the Forest Service and prosecuted by counsel employed by the Department of Agriculture, with Forest Service employees as witnesses, where such action is in accordance with a Memorandum of Understanding between the agencies. *United States* v. *Freese*, 37 IBLA 7 (1978).

Further to undermine the argument of appellants is their occupation, over many years, of the land in the unpatented mining claims under the guise of the United States mining laws. The location notice for each claim at issue states that the claim is located in compliance with the Revised Statutes of the United States. R. S. § 2319 is derived from sec. 1 of the Act of May 10, 1872, 17 Stat. 91, now codified as 30 U.S.C. § 22 (1976). It provides that all valuable mineral deposits in lands belonging to the United States shall be open to exploration and purchase by citizens of the United States. R.S. § 2320, based on sec. 2 of the Act of May 10, 1872, and codified at 30 U.S.C. § 23 (1976), delimits the length of a mining claim along a vein or lode. The location notices of the subject claims comport with these sections of the United States mining law. Moreover, for many years Rodney Wood, a claimant, filed annual proof of labor for the claims at issue in satisfaction of the requirement in R.S. § 2324, sec. 5 of the Act of May 10, 1872, 30 U.S.C. § 28 (1976). In 1970, Rodney Wood, on behalf of himself, Victor Wood, Walter S. Wood, and Wallace Wood, heirs under the Estate of Walter Roy Wood, filed a notice of intention to hold the subject claims within a withdrawn area without performing assessment work as provided by the laws of the United States. It is thus abundantly clear that these claimants have continuously considered their unpatented mining claims to be on lands of the United States and they have attempted to hold the claims through their alleged conformance with the requirements of the applicable Federal mining laws. We find their argument on appeal that the United States has no jurisdiction over the unpatented claims to be without merit.

Appellants submitted 50 proposed findings of fact and requested a ruling on each. The applicable section of the Administrative Procedure Act (APA), 5 U.S.C. § 557 (c) (1976), provides:

> (c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—
>
> (1) proposed findings and conclusions; or
>
> (2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and
>
> (3) supporting reasons for the exceptions or proposed findings or conclusions.
>
> The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—
>
> (A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and
>
> (B) the appropriate rule, order, sanction, relief, or denial thereof.

Of the proposed findings of fact, all except one were submitted to Judge Ratzman in 1977 following the first hearing involving these mining claims. At that time Judge Ratzman declined to pass on the proposed findings individually. The following excerpt from his decision adequately addresses and describes the largely irrelevant character of these requested findings:

> The attorney for the Wood brothers filed approximately 15 pages of requested findings of fact and conclusions of law. However, the requested findings are interlarded with (1) references to mining that occurred approximately sixty years ago on claims in Section 36, to the north of the contested claims, (2) accounts of activity many years ago at a smelter at Heroult which is no longer operating, (3) generalities concerning a manganese bearing porphyry which is observable in an adjacent township, and colors and coatings on gossan and "iron cap" found on the contested claims, (4) references to general testimony about fault zones, transportation courses, fracture patterns, sulphide deposits and intrusive rock, (5) statements contending that minerals were produced and sold from one of the contested claims, based on conclusions of one Logan who reportedly has corrected or modified material in Bulletin 152, *Manganese in California*, Exhibit 8, and (6) descriptions of drilling and other work on claims not involved in this contest.

Clearly, these were not the findings of fact and law contemplated by the APA, *supra*. The Board found no error in the decision of Judge Ratzman not to pick through these proposed findings, and expressly found that appellants' APA rights had been adequately satisfied. *United States* v. *Estate of W. R. Wood*, 34 IBLA at 51. As we found no error in the declination of Judge Ratzman to rule on each of the findings, so we continue to decline to review each finding individually. *See Deep South Broadcasting Co.* v. *F.C.C.*, 278 F. 2d 264 (D.C. Cir. 1960); *Community & Johnson Corp.* v. *United States*, 156 F. Supp. 440 (D. N.J. 1957).

We have considered the proposed findings and conclusions submitted, and, except to the extent that they have been expressly or impliedly affirmed in this decision, they are rejected on the ground that they are, in whole or in part, contrary to the facts or because they are not relevant to the rulings that have been made. *See National Labor Relations Board* v. *Sharples Chemicals, Inc.*, 209 F.2d 645 (6th Cir. 1954); *United States* v. *Zweifel*, 11 IBLA 53, 80 I.D. 323 (1973).

Appellants also argue that the evidence of Dr. Klobusicky detracts from the negative prudent man conclusion expressed by mineral examiner Ball for the Government. In support, they cite *Charlestone Stone Products Co., Inc.* v. *Andrus*, 553 F.2d 1209, 1213 (9th Cir. 1977), *rev'd on other grounds*, 436 U.S. 604 (1978):

> We cannot affirm the examiner's conclusion simply by isolating a specific quantum of supporting evidence. * * * Davis, 4 Administrative Law Treatise § 29.03 (1958) * * *. Evidence which may be logically substantial in isolation may be deprived of much of its character or its claim to credibility when considered with other evidence. * * * and *Universal Camera Corp. v. N.L.R.B.* (1951) 340 U.S. 474, 484-88.

It is conceded that Dr. Klobusicky possesses impressive qualifications as a mineral expert, but we cannot agree that his testimony and evidence preponderate over the negative conclusion expressed by the Government's witness. In the final analysis, the greater part of Dr. Klobusicky's testimony related to land not within the 10 mining claims at issue.

[BY MR. LAWRENCE:]

Q Well, if I understand you correctly, you thereafter moved your sample points approximately one quarter mile, if I read the scale correctly, southwest, because you—southeast—southwest, because you were advised to do so by one of the claimants, is that right?

[BY DR. KLOBUSICKY:]

A That's right. Because I was told that I was not here at the time of sampling, but I was on the Mangenes Claim. I have no way of disclaiming or verifying this. It can be usually verified by finding the claims. I didn't do any surveying of my own.

Q Do you have any independent knowledge at all of where your sample points were then other than what the claimant may ultimately have told you?

A No, I didn't do any surveying, or didn't tie my samples to corners, claim corners. I don't know.

Q Well, isn't it true then except for the four sample points which you now state were relocated on this map, you did no sampling on the 10 claims in issue?

A That's correct, yes.

Q So you have no first-hand information as to any one of them, do you?

A No.

Q What you state then is based solely on inference that whatever may be underground may extend into one of those 10 claims?

A That's right.

(Tr. 120-21).

Dr. Klobusicky stated that he did not know the location of the corners of the claims so he could not state positively that the mineral showings he saw were on the claims.

Q In other words, whatever activity they should carry on in the future should be in a precisely opposite direction than the Manganese [*sic*] No. 2 Claim?

A That's right.

Q Very well. And I take it also that because of the decreasing values shown by these samples, you would not presently be in a position to recommend that further activity take place on the Mangenes No. 2, is that not also correct?

A I don't—unless I know the exact position of my samples, it is not very hard to establish by finding the section corners, which I'm told they are all in, where the exact position is. I would need to know how much ground is there left on the Mangenes No. 2 to explore in either direction. But I'm looking at this as a mining project not as a claim line. I'm following structures not property lines.

Q Well, you understand, of course, that today's proceeding does concern property lines and claim lines?

A Yes, but it is very hard for me to understand why—well, I have elaborated on this before.

* * * * *

Q Did you ever learn the boundaries of any of the 10 claims under consideration today?

A No. I haven't seen or looked for claim corners. I was trying to carry out the geological assignment.

Q And how did you determine where any of your samples was, in fact, taken so that you could locate them on a map?

A Mr. Rodney Wood guided me throughout my work on the property, and with each sample, as I entered the samples into my sample book, I asked him where we are at, because I couldn't tell. I relied on the information received from him.

(Tr. 121–22, 143).

To the contrary, Dr. Klobusicky emphasized that he relied upon geological inference to suggest the presence of minerals on the claims. In response to several direct questions, he stated that much more exploration, including drilling, was necessary to determine the extent of the mineral occurrence on the claims at issue.

Q Well, you—implicit in your recommendation, if I hear it correctly, is that they should obtain more information about what is there, is that roughly it?

A That's right. What is there was calculated and the tonnage were outlined and go in the mining procedure—you go from the known into the unknown areas. You expand your known reserves and try to amplify your economics.

Q I assume that until they obtain this additional information, it is not your recommendation that they start mining operations?

A No, no. This is not normally being done.

* * * * *

Q Your recommendation is that you obtain more information, isn't that correct?

A Right. Expansion of the existin reserves.

* * * * *

Q Are you able to form any sort o rough estimate as to what it might cos to develop the needed information?

A Well, I will have to try to evad the question the best I can.

(Tr. 116–17, 123, 129).

Dr. Klobusicky did not recom mend commencement of mining op erations for either iron or manga nese based on the present informa tion.

Q What I am asking you is what pe centage would you feel should be show by your sampling before you would re ommend that mining take place?

A Well, a mining project is a functi of basically two economic factors; o is grade and the other is tonnage. And then the third, of course, is marketing. Manganese now in the latest issue of the Mining and Engineering Journal was quoted at $1.40 per unit per ton, which would imply the 16 percent times $1.40, how much—$18.00 or $20.00.

Q That would be about $22.00?

A Yes.

Q Well, would that in your opinion be a practicable operation?

A If sufficient tonnage developed.

Q Well, have you seen any indications yet that there is sufficient tonnage?

A I can't say. There could be. I can't say.

Q The determination has yet to be made I take it?

A Right.

*   *   *   *   *

Q Now if we talk a moment only about the iron deposits which are asserted to be on these claims, can you state when consideration was first given to the possibility that there might be worthwhile iron deposits on these claims?

A Well, the Wood brothers brought this property to Bunker Hill's attention in '64 as an iron ore prospect.

Q And were you involved in that particular inquiry?

A I've examined, based on their submittal, I've examined the property.

Q And did you make any report at that time as to what, if anything, should be done with the iron occurrences on the claims?

A I recommended examination in more detail, and the response was to the effects—I have to rack my brains—to the effect that it will be contingent, further work would be contingent upon the outcome of the ironex project.

Q Which project is that one?

A The ironex project.

Q Oh, yes.

A Which is located at one mile to the northwest of the Wood property.

Q I see. What was the nature of the additional information you thought would be required.

A Drilling of the same kind that we have carried out on the ironex property.

Q Then, after that date, it was your belief that a great deal more information would be required before any kind of mining operation could commence I take it?

A Right, that's correct.

Q Very well. Now when was attention next given, after that date, to the possibility of there being a worthwhile iron deposit, to your knowledge?

A Well, I was asked to carry out the examination of this complex of claims the beginning of '79, with the view of giving attention to any potential in the area, and that included iron, manganese, silver and gold.

Q And I take it your view still remains that more information should be developed before further—before mining takes place, is that correct?

A That's correct.

*   *   *   *   *

Q Well, are you not saying that you have to hope for betterment of the marketing conditions before the development can proceed?

A Well, this risk is generally accepted by mining. We are developing right now zinc deposits because zinc, in spite of the fact that the zinc world markets are low, but they are not going to stay low. We have a reasonable expectation of that.

Q Well, do you know of any potential developer of this property to whom you would recommend today—

A No, I do not.

Q I didn't quite finish the sentence. You would recommend today that he would come in and develop it?

A Sorry.

Q Very well. Now I think we've been talking about the iron, potential iron deposits. Do you have any different views as to the potential magnesium deposits?

MR. MURRAY: Manganese.

MR. LAWRENCE: Manganese, excuse me.

WITNESS: Manganese is generally in short supply, but it takes a volume and grade to develop a mine. So there are indications of volume and grade, in my opinion, here based on my sampling and based on the California Report, where some quantities of ore were mined and ran on the average, I believe, 27 percent.

BY MR. LAWRENCE.

Q Do you know of any manganese user or buyer to whom you today make a recommendation in regard to this property any more enthusiastic than the recommendation you'd made in iron?

A No, I'm not familiar—too familiar with the mining—with the managanese ore industry.

Q Again, wouldn't it be reasonable to believe that further information would have to be obtained concerning the manganese, its quality and quantity, before anyone could proceed?

A That's right.

(Tr. 117–18, 126–27, 133–34).

No serious indications of either gold or silver were found by Dr. Klobusicky on the subject claims. The witness further declined to express any opinion as to possible profitable mining operations on the 10 claims.

[BY MR. LAWRENCE:]

Q Did you make any effort to obtain the results of the earlier drillings, the drill logs, or were you just informed that they weren't available?

A No. If they are not available, I don't know what I can do about it.

Q Who represented to you that they were not available? One of the Woods?

A Mr. Rodney Wood, yes.

Q What information was given to you by the Woods, firm information which was utilized by you in the preparation of any one of your reports, including the early Bunker Hill report?

A I was given the map by Mr. Free and the State of California Bulletin 152, and then reference was made to my own examination made in 1964.

Q And I take it no firm information was given to you as to any values in the ground—

A No.

Q —other than this very general material?

A No, except the assay data on the maps.

Q Now turning to the —briefly to the ironex project, you indicated, I believe, that it was abandoned at the eleventh hour because it was discovered that cheaper deposits had been uncovered in Australia, is that correct?

A That's correct

Q Did that mean that at that point there were no longer available any buyers for the ore in that deposit?

A That correct.

Q Do you know if there have been any buyers since that day for that ore?

A Well, Oregon Steel expressed an interest and still might be holding it. I don't know who is the present owner of the deposits. So those kind of deposits that have generally an economic potential are being held by major companies as a mineral reserve, because market conditions and economic changes locally or on a world-wide scale—if you have a significant deposit that was once already considered as an economically viable deposit being held in a mineral reserve status and pending economic, other developments.

Q Are you perhaps saying that the market has to improve in order to develop the deposit?

A Probably, yes, or a crisis or a war or—there are many—we have seen the last two years very drastic changes in metal prices, copper, zinc, lead, silver raised about 600 percent, gold about 1200 percent. So very drastic shifts in mineral economics.

Q Well, in any event, this particular project was abandoned, was it not, because it couldn't meet the competition provided by Australia?

A That's correct.

Q And so far as you know it has not been financially practicable to start the project up again?

A Not to my knowledge.

Q Now would the same reservations not apply to the whatever iron presence there may be on the Wood claims?

A Yes, it certainly would.

(Tr. 130–32).

We agree with Judge Clarke that the contestees did not prove that a prudent person would expend further labor and means with a reasonable prospect of developing a valuable mine.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Douglas E. Henriques
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

James L. Burski
Administrative Judge

AMANDA COAL CO.

2 IBSMA 395

Decided *December 22, 1980*

Appeal by Amanda Coal Co. from the Apr. 21, 1980, decision of Administrative Law Judge David Torbett, Docket No. NX 0–34–R, sustaining the violation of 30 CFR 715.17( )(2)(iv) (described as a failure to surface an access road with durable material) alleged by the Office of Surface Mining Reclamation and Enforcement in Notice of Violation No. 79–2–39–27.

Affirmed.

1. Constitutional Law: Generally—Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Scope of Review

The Interior Board of Surface Mining and Reclamation Appeals is not the proper forum to consider the constitutionality of regulations promulgated by the Secretary.

APPEARANCES: J. L. Roark, Esq., Cook & Roark, Whitesburg, Kentucky, for Amanda Coal Company; Courtney W. Shea, Esq., Office of the Field Solicitor, Knoxville, Tennessee, Walton D. Morris, Jr., Esq., and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

This appeal was brought by Amanda Coal Co. (Amanda) from the decision of Administrative Law Judge David Torbett, issued orally on Mar. 19, 1980, and confirmed in writing on Apr. 21, 1980, sustaining a violation of 30 CFR 715.17(*l*)(2)(iv) alleged by the Office of Surface Mining Reclamation and Enforcement (OSM) in Notice of Violation (NOV) No. 79–2–39–27.

Factual and Procedural Background

An inspection by OSM of a surface coal mining and reclamation operation conducted by M.T.S. Leasing Co. in Knott County, Kentucky, pursuant to permit No. 060–7001, resulted in the issuance of NOV No. 79–2–39–27.[1] Of the four violations of the Department's initial program regulations alleged in the NOV, only that of 30 CFR 715.17(*l*)(2)(iv), described by OSM as a failure to surface as access road with durable material, remains in issue.[2]

Review of the NOV before the Hearings Division occurred on Mar. 19, 1980. At the conclusion of the hearing, the Administrative Law Judge issued an oral decision, confirmed in writing on Apr. 21, 1980, sustaining the alleged violation of 30 CFR 715.17(*l*)(2)(iv).[3] The basis for this decision was the determination that the proof of the parties respecting the alleged violation was in equipoise.

Discussion and Conclusions

The applicant for review of a notice or order issued pursuant to sec. 521 of the Act bears the ultimate burden of persuasion of the invalidity of an alleged violation.[4] Accordingly, when the proof offered at a review hearing by the applicant merely challenges but does not overcome the prima facie case persented by OSM, the contested fact is sustained.

[1] Amanda has not challenged the determinations below that OSM presented a prima facie case in support of the alleged violation of 30 CFR 715.17(*l*)(2)(iv) and that the proof offered by both parties concerning that alleged violation was of equal weight. Appellant has only argued that the burden of proof prescribed in 43 CFR 4.1171(b) violates its right to equal protection under the United States Constitution.[5] We have repeatedly indicated that the Board is not the proper forum to consider the constitutionality of regulations promulgated by the Secretary.[6]

For the foregoing reasons, that portion of the decision below sustaining the violation of 30 CFR 715.17(*l*)(2)(iv) alleged in NOV No. 79–2–39–27 is affirmed.

---

[1] This enforcement action was taken pursuant to sec. 521 of the Surface Mining Control and Reclamation Act of 1977 (Act), Act of Aug. 3, 1977, 91 Stat. 504–07, 30 U.S.C. § 1271 (Supp. II 1978). The NOV was originally identified as No. 79–2–39–26 and issued to Amanda Coal Co. (a subsidiary of M.T.S. Leasing Co., said to be operating under Kentucky permit No. 260–5003. It was later modified in the respects of its number and the identities of the recipient and permit under which the subject operation is conducted. M.T.S. Leasing Co. is the permittee or operator identified in the modified NOV and is the real party in interest in these proceedings. Because the decision below refers to Amanda Coal Co., however, that name is used to identify the appellant in this decision.

[2] 30 CFR 715.17(*l*)(2)(iv) provides in pertinent part: "Access and haul roads shall be surfaced with durable material. Toxic- or acid-forming substances shall not be used."

[3] Three other violations alleged in the NOV were vacated by the decision below. OSM did not appeal those portions of the decision.

[4] 43 CFR 4.1171 provides:

"(a) In review of sec. 521 notices of violation or orders of cessation or the modification, vacation, or termination thereof, including expedited review under § 4.1180, OSM shall have the burden of going forward to establish a prima facie case as to the validity of the notice, order, or modification, vacation, or termination thereof.

"(b) The ultimate burden of persuasion shall rest with the applicant for review."

[5] More particularly, appellant has noted that a different burden of proof obtains, under 43 CFR 4.1155, to the party initiating review in a civil penalty proceeding, and has concluded that the difference between this burden and that prescribed in 43 CFR 4.1171 results in a denial to appellant of the equal protection of law contemplated under the United States Constitution.

[6] *See, e.g., Keister Coal Co.*, 2 IBSMA 59 (1980); *C & K Coal Co.*, 1 IBSMA 118, 86 I.D. 221 (1979).

WILL A. IRWIN
Chief Administrative Judge
NEWTON FRISHBERG
Administrative Judge
MELVIN J. MIRKIN
Administrative Judge

MIAMI SPRINGS PROPERTIES

2 IBSMA 399

Decided *December 23, 1980*

Appeal by the Office of Surface Mining Reclamation and Enforcement (OSM) from a June 23, 1980, decision of Administrative Law Judge Tom M. Allen in Docket No. CH 0–97–R, dismissing the case and vacating violation 1 of Notice of Violation No. 79–I–58–21 and Cessation Order No. 79–I–37–3 on the grounds that OSM had failed to present a prima facie case that Miami Springs Properties was required to return an orphan highwall to approximate original contour under 30 CFR 715.14.

Reversed and remanded.

1. Surface Mining Control and Reclamation Act of 1977: Approximate Original Contour: Generally—Surface Mining Control and Reclamation Act of 1977: Backfilling and Grading Requirements: Highwall Elimination—Surface Mining Control and Reclamation Act of 1977: Backfilling and Grading Requirements: Previously Mined Lands

The augering of a coal seam in an orphan highwall may make a permittee responsible for returning the entire highwall to approximate original contour.

2. Surface Mining Control and Reclamation Act of 1977: Evidence: Generally

In this case, because OSM presented sufficient evidence to establish a prima facie case that the permittee had augermined the coal seam at the base of an orphan highwall and that that mining had an adverse physical impact on the highwall, it was error for the Administrative Law Judge to grant a motion to dismiss made at the conclusion of OSM's evidence.

APPEARANCES: Mark Squillace, Esq., and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Division of Surface Mining, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

The Office of Surface Mining Reclamation and Enforcement (OSM) has appealed the June 23, 1980, decision of Administrative Law Judge Tom M. Allen granting Miami Springs Properties' (Miami Springs) motion to dismiss for OSM's failure to present a prima facie case. For the reasons set forth below, we hold that the motion to dismiss should not have been granted and remand the case to the Hearings Division for further proceedings.

Background

On Sept. 13, 1979, OSM inspected Miami Springs' operation under permit 60–78 in Lewis County, West Virginia, pursuant to the Surface Mining Control and Reclamation Act of 1977.[1] Permit 60–78 was issued on Apr. 14, 1978, and allowed Miami Springs to auger-mine a previously mined coal seam at the base of an orphan highwell.[2] No company representatives were present during the inspection, but the inspectors observed an auger in place and four auger holes at the base of the highwall.

Following the inspection, OSM issued Notice of Violation No. 79–I–58–21 to Miami Springs. Violation 1 cited the failure to return the disturbed area to approximate original contour, in violation of 30 CFR 715.14.[3] After a followup inspection OSM issued Cessation Order No. 79–I–37–3 on Dec. 28, 1979, for failure to abate violation 1 of the notice.

Miami Springs sought administrative review of the notice and order, and a hearing was held on May 23, 1980. The written decision, issued on June 23, 1980, confirmed the decision from the bench granting Miami Springs' motion to di
miss made at the conclusion
OSM's evidence. The decision foun
that OSM had failed to present
prima facie case. OSM appeale
this decision and filed a brie
Miami Springs did not file a rep
brief.

Discussion and Conclusions

[1] It is evident from the reco
that the decision below was bas
upon a misconception of *Ced*
Coal Co., 1 IBSMA 145, 86 I.D. 2
(1979). The Administrative La
Judge stated at the hearing
Miami Springs that

> the Board did not mention the auge
> of coal at all in its discussion in Ced
> and, yet, the evidence in Cedar Coal w
> that it was, in fact, an augering sit
> tion * * *. * * * [I]t is neither the
> tention of the Act nor the finding of
> Board that an orphan highwall must
> returned to [approximate original c
> tour] from augering mining [*sic*], if
> complies with the State requireme
> The Act does not touch it and the fi
> ings of the Board in Cedar Coal will
> followed.

(Tr. 13, 15. *See also* Tr. 127). It
true that the Board's decision
Cedar did not mention augering.
is also true that the initial decisi
in *Cedar* did not mention augeri
The reason for this is that the u
disputed testimony in that case w
that, although the permit allow
augering, none had taken place
fore the notice of violation was
sued (Tr. in *Cedar Coal Co.*, D
ket No. CH 8–17–R at 38, 4
Therefore, the Board's decision
Cedar does not address the qu
tion of whether the augering o

---

[1] Act of Aug. 3, 1977, 91 Stat. 445, 30 U.S.C. §§ 1201–1328 (Supp. II 1978).

[2] As used in this opinion, an orphan highwall is a highwall that was left unreclaimed by previous mining operation.

[3] Violation 2, which alleged the construction of a haul road off the permit area, was not pursued by OSM.

coal seam in an orphan highwall makes a permittee responsible for returning the entire highwall to approximate original contour.

The Administrative Law Judge also stated that

> [t]he Board, in essence, ruled [in *Cedar*] and II, in essence, ruled that the interim regulations did not cover orphan highwalls. They covered the creation of new highwalls * * *. The Board did not disturb that finding, so I am bound by my own finding in Cedar Coal, which was not disturbed by the Board.

(Tr. 11. *See also* Tr. 15). Initially, we note that the decision in *Cedar* specifically states that "we agree with OSM that Cedar's operation is subject to the performance requirements of the interim regulations." 1 IBSMA at 154, 86 I.D. at 255. That statement was qualified only by the conclusion that Cedar had not "'disturbed' the orphaned highwall, within the meaning of sec. 710.11(d)(1)," so as to be responsible for completely eliminating the highwall. 1 IBSMA at 154, 86 I.D. at 255. This conclusion was reached because "[t]here [had] been no showing that Cedar's removal of overburden [had] resulted in any adverse physical impact on the orphaned highwall." 1 IBSMA at 155, 86 I.D. at 256. The clear implication of this language is that a permittee who did disturb an orphan highwall in such a way as to cause an adverse physical impact on the highwall might be responsible for its complete elimination.

Secondly, what the Administrative Law Judge terms a "finding" in *Cedar* was actually his conclusion of law that orphan highwalls were per se excluded from the initial regulatory program. As was just discussed, the Board did not accept this conclusion. Furthermore, as the Board has previously noted, a decision of the Hearings Division or any part of such a decision is the law of that case only and is not precedential authority for future cases. *Toptiki Coal Corp.*, 2 IBSMA 173, 176 n. 4, 87 I.D. 331, 333 n. 4 (1980).

Thus, no holding of the Board precludes a showing by OSM that Miami Springs' augering operations resulted in an adverse physical impact upon an orphan highwall. The question before the Board, therefore, is whether the motion to dismiss was properly granted because OSM failed to present a prima facie case. The Board has previously discussed what constitutes a prima facie case. In *James Moore*, 1 IBSMA 216, 223 n. 7, 86 I.D. 369, 337 n. 7 (1979), we stated: "A prima facie case is made where sufficient evidence is presented to establish the essential facts and which evidence will remain sufficient if not contradicted. It is evidence that will justify but not compel a finding in favor of the one presenting it." In attempting to establish a prima facie case, OSM is entitled to rely on the representations of company officials. *Burgess Mining and Construction Corp.*, 1 IBSMA 293, 86 I.D. 656 (1979). The company can, however, present evidence challenging the substance of those representations and the authority of the individual making them to bind the company. *Island Creek Coal Co.*, 1 IBSMA 316, 86 I.D. 724 (1979). If the company's evidence is sufficient, it can rebut OSM's prima facie case. *Sunbeam Coal Corp.*, 2 IBSMA 222, 87 I.D. 383 (1980).

[2] In this case, OSM presented evidence that its inspectors observed an auger in place on the minesite, auger holes at the base of the highwall, and disturbance along the entire length of the permit area. Company officials told the inspector that mining had taken place as provided for in the permit. Miami Springs was the only company authorized to mine this area. OSM also presented testimony and photographs indicating that tension cracks had recently developed in the area immediately above the highwall. Such cracks are strong evidence that movement had occurred in the highwall. This evidence establishes a prima facie case that Miami Springs' operations had caused an adverse physical impact on the highwall. It was, therefore, error for the Administrative Law Judge to grant Miami Springs' motion to dismiss.

Miami Springs may be able to present evidence tending to rebut OSM's case. Such evidence should be presented in the context of an evidentiary hearing.

Therefore, the decision of June 23, 1980, is reversed and this case is remanded to the Hearings Division for the presentation of evidence by Miami Springs, if the company chooses to present evidence, and for any further proceedings not inconsistent with this decision.

Melvin J. Mirkin
Administrative Judge

Will A. Irwin
Chief Administrative Judge

Newton Frishberg
Administrative Judge

TEXACO, INC., GULF OIL EXPLORATION AND PRODUCTION CO.

51 IBLA 332

Decided *December 29, 1980*

Appeal from a decision of the Director, Geological Survey, affirming an order of the Conservation Manager directing appellants to subscribe to and operate under a unit plan allocating production on the basis of net acre-feet. GS-145-O&G.

Affirmed.

1. Oil and Gas Leases: Drainage—Oil and Gas Leases: Unit and Cooperative Agreements—Outer Continental Shelf Lands Act: Oil and Gas Leases—Outer Continental Shelf Lands Act: Unit Plans

An order by a Conservation Manager of the Geological Survey directing oil and gas lessees of Outer Continental Shelf lands to subscribe to a unit plan allocating production from a specific reservoir on the basis of original net acre-feet of gas-bearing sand, *i.e.*, the volume of gas-bearing sand in place prior to production of any gas from the reservoir, will be affirmed where such a plan of allocation of production is in common use on OCS lands and it has not been shown that the order is arbitrary or capricious.

APPEARANCES: Shirley C. Friend, Jr., Esq., New Orleans, Louisiana, for Texaco; Milton L. Duvieilh, Esq., New Orleans, Louisiana, for Gulf; Joseph C. Bell, Jr., Esq., Washington, D.C., for Shell; Charles Broome, Esq., New Orleans, Louisiana, for Exxon.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

INTERIOR BOARD OF LAND APPEALS

Texaco, Inc. (Texaco) and Gulf Oil Exploration and Production Co. (Gulf) have each appealed from the decision of the Director, Geological Survey (GS), GS–145–O&G, dated Sept. 14, 1979, wherein the Director affirmed an order issued by the Conservation Manager, Gulf of Mexico Outer Continental Shelf (OCS) Operations, directing Texaco, Gulf, Exxon Co., U.S.A. (Exxon), and Shell Oil Co. (Shell) to subscribe to and operate under a unit plan covering a competitive gas reservoir in the Eugene Island Block 330 field, Outer Continental Shelf. The gas reservoir underlies parts of Eugene Island Block 313, 314, 331, and 332 offshore Louisiana and is situated in the "J2 Sands" within four leaseholds, OCS–G 2111 and OCS–G 2613 (Exxon), OCS–G 2116 (Shell), and OCS–G 2608 (Texaco) issued pursuant to sec. 8, Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1337 (Supp. II 1978).[1] Under the unit plan, production would be allocated on the basis of the original productive net acre-feet of gas-bearing sand, *i.e.*, the volume of gas-bearing sand in place, prior to production of any gas from the reservoir. Production was allocated as follows:

59.52776 percent to Shell, lease OCS–G 2116;

36.49844 percent to Exxon, leases OCS–G 2111 and OCS–G 2613;

3.97380 percent to Texaco, lease OCS–G 2608.

Production of gas from the reservoir commenced on Exxon's lease OCS–G 2111 in Jan. 1974; from Shell's lease OCS–G 2116 in Dec. 1975; from Exxon's lease OCS–G 2613 in Nov. 1976; and from Texaco's lease OCS–G 2608, well A–11, on Dec. 20, 1976. The Oil and Gas Supervisor, on Nov. 16, 1976, determined that the reservoir under the Shell and Exxon leases was competitive, and thereafter on Mar. 18, 1977, the Conservation Manager determined that the following reservoir in the Eugene Island Block 330 field should be operated under an approved plan of unitization in the interest of conservation:

Exxon leases OCS–G2111 and OCS–G 2613	"D" Sand, reservoir C (DRC).
Shell lease OCS–G 2116	"J2" Sand, reservoir F (J2RF).
Texaco lease OCS–G 2608	"D" Sand, reservoir C (DRC).

---

[1] OCS lease G 2608 is held jointly by Texaco and Gulf. Texaco is the operator of the lease.

The parties were given 6 months to submit a proposed plan of unitization of the reservoir designated as "J2RF" in the Block 330 field. However, no agreement could be reached by the lessees as to an acceptable basis for allocating the unit production from the J2RF (Shell), and DRC (Exxon and Texaco). By letter of Jan. 5, 1978, the Conservation Manager advised the lessees that he would accept an allocation formula based on either the original net acre-feet or the original recoverable reserves and that the effective date of unitization would be Apr. 1, 1977. The parties were allowed until Feb. 15, 1978, to submit the plan of unitization. Except for the allocation formula, Article 13 of the unit agreement, and Exhibit C, unit participation, the lessees agreed to a plan of unitization. By letter of Apr. 7, 1978, the Conservation Manager approved the unit agreement for the J2RF Sand, Blocks 313, 314, 331, and 332, with the allocation based on the original productive net acre-feet. Texaco and Gulf appealed to the Director, Geological Survey, who by decision of Sept. 14, 1979, GS-145-O&G, affirmed the Conservation Manager's order.

The Director's decision after delineating the competitive nature of the reservoir and describing the the reservoir and describing unitization authority, stated:

> 3. The provisions in unit plans prescribed by a Conservation Manager must be upheld unless they are arbitrary, capricious, or constitute an abuse of discretion. The Conservation Manager exercised his authority to prescribe a unit plan only after the parties had reached an impasse following almost a year of negotiations. The terms of the unit plan here involved represent a reasonable exercise of the Conservation Manager's discretionary authority. The order allocated the production from the reservoir to each lease on the basis of the productive net acre-feet underlying each leasehold. This is a commonly used allocation method. [Although] Gulf and Texaco are urging that production be allocated partly in terms of well producing capacity * * * the Conservation Manager properly determined that, in the absence of an agreement by the parties, allocation based on original productive net acre-feet would provide for a reasonable and equitable allocation of production.
>
> The reserves underlying the Exxon and Shell leases are significantly greater than those underlying the Gulf-Texaco lease. Allocation based on current productivity would in effect award appellants some of the gas underlying the Shell and Exxon leases.
>
> Moreover, the production rate of well A-11 is a point-in-time factor which is expected to change. The Texaco-Gulf well A-11 is located in an unfavorable structural position. Available data suggests that the well is located near a sealing fault which, in the case of a water-drive reservoir, is likely to contribute to an early "watering out." * * * The production history of the well supports this conclusion. During December 1977, well A-11 produced 276 barrels of water and 1,447,458 MCF of gas; during May 1978, the A-11 well produced 22,731 barrels of water and 552,825 MCF of gas.
>
> The use of large diameter tubing is not an advanced design concept which must be "rewarded" by including productivity as an allocation parameter. * * *
>
> Although Gulf contends that it will be unable to recoup drilling costs, Gulf has no right to expect recoupment of such costs by production of gas underlying tracts under lease to Shell or Exxon. * * *
>
> The unit plan effective date is the first of the month following the issuance of

> the order requiring unitization. The effective date chosen has a rational basis, and it will therefore be upheld.
>
> Our affirmance of the Conservation Manager's order should not be understood as implying that approval of a different unitization plan would have been unreasonable. Each unitization plan involves a great many factors which can be structured in various equitable forms.

On the ground that the issues had been extensively briefed, the Director also denied a request for oral argument.

[1] The primary issue presented by Texaco's appeal is whether or not under the facts of this case the high productivity of Texaco's A-11 well, producing from the unitized sand, should be recognized and given equity participation in the involved unit.

Texaco argues that there is nothing in OCSLA, *as amended*, and its implementing regulations which would prohibit or prevent productivity from being a factor in determining unit equity. To the contrary, Texaco contends, it is to the advantage of the lessor and the nation to foster productivity, and the other parties to the unit will not be improperly or unduly prejudiced thereby, citing sec. 102(2) and (3), OCSLA Amendments of 1978, 43 U.S.C. § 1802 (Supp. II 1978).

It is contended that the Director's decision failed to take into account and give effect to appropriate and relevant factors required in reaching a correct determination in this matter. Three substantive conclusions were made in the Director's opinion, *supra*, all of which, in Texaco's opinion, improperly address issues of utmost importance. Texaco believes these conclusions are unsupported by the record and offers the following reasons:

> *Conclusion No. 1* outlines the authority for requiring unitization and provides for: a) prevention of waste, b) conservation of resources of the OCS, and c) protection of correlative rights. [Sec. 5 (a)(1), OCSLA, *as amended*, 43 U.S.C. § 1334 (Supp. II 1978), and 30 CFR 250.50.] The denial of Texaco's appeal is invalid primarily because protection of correlative rights is employed as an artifice to overlook or ignore both the resource-conservation principles and the prevention of waste aspects that are inherent in the directed authority.
>
> *Conclusion No. 2* states that unitization furthers the interest of conservation. Texaco continues to agree with the general principle that reservoir-wide unitization is of conservational interest. At the same time, however, Texaco contends the *method of participation* proposed and the denial of our appeal is not only unsupported by the records, but is also an abuse of regulatory discretion. Conclusion No. 2 attempts to promote a regulatory virtue of preventing added drilling by Exxon and Shell since their wells would constitute added potential for pollution. The conclusion thus accommodates a correlative rights aspect that ignores the desirability of improved hydrocarbon recovery from the reservoir. Texaco strongly disputes the appeal denial for ignoring so vital an issue. High producing rates unquestionably improve recovery by raising the reservoir-pressure drawdowns and reducing the residual-gas saturations remaining behind the advancing gas-water interface during depletion of partial water-drive reservoirs. Refusal to recognize such a fundamental recovery principle is invalid and contrary to law and equity. [Italics in original.]

Conclusion No. 3 contends that, while other participation parameters may have a justifiable basis at other times and places, acre-feet is a commonly used method and is reasonable and equitable. The conclusion states, "Our affirmance of the Conservation Manager's order should not be understood as implying that approval of a different unitization plan would have been unreasonable. Each unitization plan involves a great many factors which can be structured in various equitable forms." Denial of Texaco's appeal, we are to interpret then, is based on one corner of the triad of responsibilities given the Conservation Manager. The denial embraces protection of correlative rights by stopping Exxon and Shell from driling additional wells and thereby adding to pollution potential. Texaco's appeal and request for inclusion of productivity as a participation factor would have allowed the Conservation Manager's exercise of responsibility to recognize in the participation formula the other two aspects, i.e., preventing underground waste and conservation of natural resources of the OCS. Eliminating the two latter aspects in the participation mechanism is improper under the circumstances and will be harmful to future OCS development, be repellant to the principles involved in increased hydrocarbon recovery, and will not be in the national interest of increasing gas production. Moreover, the denial of the appeal will encourage operators in the future to avoid normally prudent drilling programs endeavoring to accomplish high productivity and, on the pretense of pollution potential, encourage them to attempt to insert undrilled, unproven acreage into units with low daily producing rates. As an example, without the high productivity of the A-11 well, additional wells would be necessary to produce the reservoir at the high withdrawal rates required to maximize recovery. Similarly, had other operators completed their wells for high withdrawals, far fewer wells would have been necessary for effective depletion. Texaco must therefore conclude that waste reduction, resource conservation, and pollution potentiality are very misunderstood principles that were applied haphazardly and unfairly and far too late in the reservoir development cycle.

Additionally, Texaco asked for oral argument before the Board.

The position of Gulf is succinctly set forth in its statement of reasons on appeal:

> [Gulf] maintains the Conservation Manager's requirement that it drill prior to unitization, coupled with his unit plan allocating production by a forumla which ignored the high productivity rate of the well and simultaneously resulted in appellant's lease receiving less than 4% of unit production, deprived appellant of its equitable share of unit production or the beneficial use of its leasehold and constituted a taking of property for public use without due process and compensation. The allocation formula distributing unit production on the basis of origina productive net acre-feet of gas-bearin sand should be modified to include an appropriate productivity factor whicl recognizes the unusual productivity rat of the A-11 Well in relation to the othe unit wells.

* * * * *

> * * * The Conservation Manger simpl is not empowered to formulate a rule o regulation, the effect of which can resul in the confiscation of the lessee's equi able share of unit production or the ben ficial use of his lease rights. The Co servation Manager's allocation formula so onerous as applied to the facts an circumstances involved in this instanc that it can be considered nothing le than a taking without compensation prohibited by the Fifth Amendment. T conclusion is inescapable that the Co servation Manager, in adopting the location formula, did not consider t impact on a federal lessee, did not c sider that the federal lessee was requi

> to drill a well to recover the reserves underlying the federal lease, and did not consider the well's superior productivity rate in the allocation formula controlling lessee's participation in unit production.

Exxon took a contrary position. Its position is well summarized in its brief to the Board from which we quote:

> Exxon believes that the Director acted correctly in affirming the Conservation Manager's order, which in Exxon's view is in the interest of conservation and allocates to each working interest owner its share of the reservoirwide unit on a basis that is fair and equitable.
>
> While Exxon believes that the record as it stands is adequate to support an affirmation of the Director's decision, it undertakes to briefly address Texaco's and Gulf's contentions in this appeal as follows:
>
> 1. Texaco argues that the Director applied an incorrect standard of review in affirming the Conservation Manager's order.
>
> Exxon does not regard this as a significant issue, since it is Exxon's belief that the order is sustainable under a wholly independent standard of review as well as under the "arbitrary, capricious, or abuse of discretion" standard.
>
> 2. Texaco contends that the Director's Conclusion No. 1 overlooks or ignores the resource conservation and waste prevention aspects of Interior's unitization authority as set out in the OSC Lands Act, and that protection of correlative rights is used as an "artifice."
>
> It is well settled that each of the three statutory criteria is in its own right a valid basis for unitization, and Exxon believes that the Department exercised proper regulatory discretion in this instance, where both protection of correlative rights and conservation in the sense of eliminating unnecessary wells are served by the unitization order.
>
> 3. Texaco, in discussing Conclusion No. 2, takes the position that the *method of participation* in a unit affects reservoir management of the unitized reservoir.
>
> Exxon maintains that reservoir management is a function of economic feasibilities and application of Petroleum Engineering principles. Method of participation in a unit has no relationship to either of these basic concepts. In Conclusion No. 2, the Director correctly recognizes that, absent unitization, wells unnecessary for draining the reservoir but necessary for the protection of correlative rights would have been drilled: thus unitization was in the interest of conservation. The Director also agrees with Exxon's contention that there are sufficient completions and future workover opportunities to adequately and efficiently drain the reservoir. This is demonstrated by the continued decline in reservoir pressure. Thus, the Director has correctly recognized fundamental reservoir management concepts.
>
> 4. Texaco contends, in discussing only part of Conclusion No. 3, that the Director's decision "is based on one corner of the triad of responsibilities given the Conservation Manager."
>
> Exxon maintains that as reservoir pressure has been declining and is continuing to decline, economically preventable underground waste is not occurring. Further, it is established that preventing the drilling of unnecessary wells is inherently conservation of natural resources. Industry is and has been making high-volume completions. Economic and reservoir considerations, not potential unit participation interests, dictate where high-volume completions are made. In instances where a reservoir has a short life, the added cost of making a higher-volume completion could constitute economic waste. In other instances, high-volume completions eliminate the drilling of unnecessary wells, thus conserving resources and avoiding waste. The need for high-volume completions must be evaluated on the specific circumstances

> including experience available at the time of making the decision applicable to a given well or reservoir.
>
> * * * * *
>
> Exxon submits that the Conservation Manager's order was a reasonable exercise of regulatory discretion, and that the Director's decision sustaining it should be left undisturbed.
>
> Exxon does not believe that oral arguments before the Board are necessary, in view of the fact that arguments on both sides have already been thoroughly presented.

Shell asserts that the decision of the Conservation Manager allocating production on the basis of net acre-feet was proper, as the A–11 well has no characteristics which warrant preferential treatment for Texaco and Gulf, and the high level of production from the A–11 well is likely to be a transitory phenomenon. Consequently, the allocation formula adopted by the Conservation Manager best serves the interests of conservation.

In conclusion, Shell stresses that the Conservation Manager's decision to allocate production on the basis of net acre-feet is rational and supported by the evidence in the record, and it should be affirmed. Under the facts of this case, it contends an allocation formula based on the productivity of a single well at a given point in time would be contrary to the interests of conservation and, thus, in derogation of the purposes unitization is designed to serve.

Texaco and Gulf each requested the opportunity for oral argument before the Board, a request that
both Shell and Exxon oppose
However, after reviewing the ope
ing briefs and the record, the Boa
granted oral argument, which w
heard July 22, 1980. Appeari
were Shirley C. Friend, Esq., f
Texaco; Milton L. Duvieilh, Es
for Gulf; Joseph C. Bell, Jr., Es
for Shell; and Charles Broon
Esq., for Exxon. Although invit
to appear and participate, no rep
sentative of the Solicitor's Off
appeared on behalf of Geologi
Survey.

At the oral argument, Texa
stated that the Eugene Island Bl
330 unit under discussion is the f
compulsory unit imposed by GS
the Gulf area. The argument
presented that the Texaco well,
11, was the most prolific produce
gas in the entire Gulf and tha
had contributed more than 3.97
cent of unit production. In Te
co's view, its well was drilled
protect the correlative rights
Texaco against the existing
wells of Exxon and Shell. The A
was spudded in June 1976 with
drilling completed by mid-July,
the casing was not perforated
tubing installed until Dec. 1976
cause of a lack of a pipeline con
tion. When the well was comple
4½-inch tubing was utilized for
production. The well produced
50 MMCFGD during the pe
from Dec. 20, 1976, until it wat
out in Oct. 1979. Total gas prod
from A–11 was in excess of 26 B
Accordingly, Texaco contends
the allocation of production
the unit should be based 50 pe
on net acre-feet of sands and 50

cent on productivity, adverting to the method of allocation approved by GS in the Vermilion Block 320 unit.

Texaco stated that it had not been included in the original GS determination that the J2RF was competitive, even though the A-11 well had been reported to GS prior to the date of initial determination. The J2RF unit was made effective Apr. 1, 1977, less than 4 months after A-11 went on production. In contrast, Exxon had been producing from the reservoir for more than 3 years and Shell for more than 1 year. Production prior to the effective date of unitization was not subject to the allocation formula of the unit.

Texaco maintained that it had to drill A-11 to protect its correlative rights in the J2RF, as OCS Order No. 11 required a producing or producible well within the reservoir in order to participate in the unit agreement.

The larger tubing, 4½ inch, was used to recover the hydrocarbons as quickly and economically as possible. Texaco admitted that the high production from A-11 included some drainage from both Exxon and Shell, but insisted that the high rate of withdrawal increased the ultimate recovery from the J2RF reservoir. The high recovery of A-11, Texaco maintains, was not recognized in the allocation formula based on net acre-feet. It argues that high withdrawal pressure increases ultimate recovery from water drive reservoirs, such as the J2RF, although it admitted it was unable to quantify the recovery.

In response to a question about the early watering out, Texaco stated that the life of A-11 was not abnormally short and that the order of watering out in the J2RF was Exxon's A-24, Texaco's A-11, Shell's B-22, Shell's B-13A, and Shell's B-24ST. These wells went off production relative to their order from the west, the direction from which the water drive was coming.

Texaco admitted that it was overproduced based on the net acre-feet formula, Shell underproduced, and Exxon was about even. Lease production showed Texaco at 443 percent, Exxon Block 314 at 136 percent, Exxon Block 332 at 53 percent, and Shell at 72 percent.

Based on an allocation formula using 50 percent for net acre-feet and 50 percent for productivity, Texaco would be allocated 15.8 percent of the unit production, rather than 3.97 percent; Shell would receive 48.8 percent, instead of 59.5 percent; and Exxon would receive 35.4 percent instead of 36.5 percent.

Texaco concluded its argument with the following comments:

> [A] productivity factor is appropriate here because the high productivity rate is indicative of a special completion technique which resulted in increased hydrocarbon reserve recovery in this partial water drive reservoir and thereby aided ultimate recovery.
>
> Secondly, and these are pointed out in our brief, the high productivity rate of the A-11 well eliminated the drilling of additional wells into the reservoir since the A-11 well produced at almost

> three times the rate of the average unit wells. Therefore, in order to accomplish the higher reservoir production rate made possible by the A-11 well, two or three additional wells would have been necessary.
>
> Thirdly, the A-11 well has accomplished prompt and efficient development of the reservoir which would not have otherwise occurred. All consistent with the national interest, the urgency of the production of gas, consistent with the Secretary of Interior's urging to maximize production of hydrocarbons promptly and efficiently, and consistent with the mandates contained in section 102, paragraphs 2 and 3 of the OCS Lands Act Amendments of 1978.
>
> The failure to recognize productivity here as an equity as a part of the formula could have an adverse impact on OCS operations in connection with such matters as acting as a disincentive to future high volume completions. Secondly, discourage work overs. Third, cause operators to recomplete in other zones after they obtained their equity in the reservoir.

(Tr. 23.)

At oral argument, Gulf stated that there was sufficient data prior to its drilling A-11 to assure production from a well into the J2RF. Drilling was undertaken to protect correlative rights and keep Exxon and Shell from draining the tract. Gulf alleged that neither Texaco nor Gulf had any idea that the J2RF would be unitized, nor that if it were, the participation formula would be strictly on a net acre-foot basis. In Gulf's view, OCS Order No. 11 required Texaco-Gulf to drill a producing or producible well in order to join the unit. If the J2RF were to be unitized, it was expected GS would develop a formula consistent with the benefits of the well. Texaco's contention that a high rate of production is an advantage to total recovery was reiterated by Gulf.

Gulf argued that the net acre-feet formula is appropriate if no preunit production has occurred, but after substantial production from the reservoir before unitization is accomplished, use of original net acre-feet is not an equitable basis for allocation. It further argued that the aggressive drilling program of Texaco-Gulf should be recognized. Exxon commenced its first production from the J2RF some 36 months after its first lease issued. Shell commenced its production from J2RF some 59 months after its lease issued. Texaco-Gulf, however, achieved production in only 31 months. After production commenced from the A-11 well, Texaco-Gulf overproduced. With only 4 percent of the J2RF reserves, the A-11 produced 24 percent of reservoir yield. Shell, on the other hand, with 59.5 percent of the reserves, produced only 40 percent of the reservoir yield. That rate of production, Gulf maintains, suggests a superior sand condition for the A-11, which should be recognized in the allocation formula. In suppor thereof, Gulf points to the Vermilion Block 320 allocation formul utilizing productivity as a factor in the allocation of production. If the Vermilion 320 formula were applie according to Gulf, Texaco-Gul would receive 8 percent of the J2R production.

Gulf reiterated the A–11 was drilled to protect correlative rights, not to participate in a unit. There are only two ways to get production, drill a well or join a unit. Under OCS Order No. 11, a lease cannot enter a unit agreement without a producing or producible well.

Counsel for Shell noted that there are eight approved unit agreements in the Eugene 330 field, all utilizing net acre-feet as the basis for allocation of production, and that Texaco-Gulf are participants in four of these units in addition to J2RF (Tr. 48). As evidence of its widespread use, Shell states that the model unit agreement provided by GS uses net acre-feet as its allocation standard, although GS may approve variants at the request of unit members (Tr. 47). Production from a unit will invariably be over or under the allocation formula for any lessee (Tr. 48).

In Shell's view, completions adequate to drain the reservoir were in place, and 4½-inch tubing was unnecessary. There is no evidence, counsel maintains, that ultimate recovery of gas from the reservoir will be greater because of the use of such oversized tubing. Fast withdrawal of gas may lead to fingering and loss of the resource in such areas (Tr. 50).

Exxon's A–4A and A–13 wells have produced more gas than A–11, and given the fact that the water flood drive invades J2RF from the southwest, the Exxon wells A–4A and A–13 will probably be the longest-lived wells in the reservoir and ultimately the greatest producers by a large margin. As production had been achieved in the J2RF prior to the drilling of A–11, this is not a case, Shell contended, where any reward for early production is appropriate (Tr. 52).

In conclusion, Shell considered most important the Conservation Manager's authority and right to be considered the final decisionmaker, the generalized use of net acre-feet with some presumption attaching, and the lack of any special characteristics in A–11 which entitle it to special consideration (Tr. 54).

Lastly, Exxon argued that the Conservation Manager acted reasonably in ordering unit participation based on original net acre-feet. Where, as in J2RF, there is adequate information to make a reasonably accurate acre-foot determination, a formula based on net acre-feet is the proper method for allocation of production (Tr. 57). The net acre-foot formula, Exxon maintains, has been used by GS in all OCS units, including several compulsory units. The GS model unit agreement provides for allocation of production on the basis of equivalent net acre-feet (Tr. 58).

High production from a well drilled after those of other unit members, Exxon contends, would require the earlier lessees to drill more wells unnecessarily (Tr. 61). Unitization based on a net acre-foot formula, however, conserves the number of wells, usually to the number that will economically drain the reservoir (Tr. 62). The cost of drilling a well should not have any bearing on allocation from a competitive reservoir (Tr. 60).

In their pleadings before the Board, Texaco and Gulf have argued that the allocation formula approved for the Sun-Shell unit agreement involving the "P Sands" underlying Vermilion Blocks 320 and 321 is precedential and should be followed here. We believe the facts surrounding the Sun-Shell unit are distinguishable from those presented in this case.

In Feb. 1971, lease OCS-G 2087 was issued to Sun for Vermilion Block 320, and lease OCS-G 2088 was issued to Shell for Vermilion Block 321. Shortly thereafter, under a joint drilling agreement, two exploratory wells were drilled on the border between the two leases. Each company then drilled additional exploratory wells within its own lease. Drilling and production platforms were erected on each lease by autumn of 1972. Sun commenced drilling its development wells in Nov. 1972, completing its program in Nov. 1973. Commencement of Shell's development program was delayed until Apr. 1973. OCS Order No. 11 was issued May 1, 1974.

Before either lease was producing, Shell requested a determination that the "P Sands" were competitive. Sun commenced production in Nov. 1974 from five drainage points through three wells. The Conservation Manager, on May 2, 1975, issued his final determination that
the "P Sands" were competitive
Shell then terminated its drilling
program with four completed singl
wells into the "P Sands" and o
July 13, 1975, requested the Con
servation Manager to order uniti
zation of the "P Sands" in Block
320 and 321. The Conservation Man
ager, by decision of Nov. 10, 197
ordered the unitization of the "
Sands" in Blocks 320 and 32
Neither party could agree to th
terms of the proposed unit agre
ment, so on Mar. 23, 1977, the Co
servation Manager submitted
form of unit agreement, retroa
tively effective Nov. 14, 1975, to Su
and to Shell with orders that ea
execute the agreement within
days. The unit agreement was ex
cuted by both parties on May
1977.

It was determined that of th
original productive volume in th
"P Sands" reservoir, 81.1 percen
underlay the Shell lease, and 18
percent underlay the Sun leas
During the period from Jan. 1,
June 30, 1976, while Sun and She
were expected to negotiate a un
agreement, Sun's wells produce
54.9 percent of total reservoir pr
duction, and Shell's wells 45.1 pe
cent. The Conservation Manag
considered these figures to be re
presentative of the reservoir pr
duction, as all wells developed
the lessees were producing. A co
parison between the original r
serves and the actual productio
showed that Shell underproduce
by 36 percent in relation to the ori
inal reserves underlying its leas

while Sun overproduced by 36 percent. The Conservation Manager assigned a weighting factor of 0.36 to current production and a weighting factor of 1-0.36 to the original reserves. Using this formula, 68.14 percent of unit production was allocated to the Shell lease, and 31.86 percent to the Sun lease.

While it would have been economical for Shell to have drilled 7 more wells in 1975, 13 additional wells would have been required for Shell to offset fully the drainage of reserves underlying its lease. As the existing wells were adequate to drain the reservoir efficiently, the Conservation Manager in the interest of conservation, adopted his formula above set forth, allocating ultimately to Sun a share of production equal to more than double the original reserves underlying its lease, an adequate reward to Sun's earlier drilling program.

In the J2RF sand unit, the original productive net acre-feet attributed to the Texaco lease was 3.97380 percent of the total, to Shell 59.52776 percent, and to Exxon 36.49844 percent. Surface acres of the Texaco lease within the J2RF sand unit are 62.04 acres, or 2.843 percent of the total. Development of the reservoir had been achieved by Exxon with five wells and by Shell with seven wells before the Texaco well went into production. Thus, the Vermilion precedent is distinguishable, as the position of Texaco in the J2RF unit cannot be equated to that of Sun in the Vermilion 320 "P Sand."

From the record it appears uncontrovertible that the extraordinarily high production from the A-11 well was due, in large part, to the oversized tubing employed in the well. Nothing in the record supports the allegation of Texaco that a superior sand condition existed on its lease within the J2RF. Accordingly, we must find that denial of productive capacity as an equity factor in the allocation of production from J2RF was not an abuse of discretion or an arbitrary and capricious act by the Conservation Manager.

It is also uncontroverted that the J2RF is a competitive reservoir as to the four leases and that Texaco had to drill the A-11 well to protect its correlative rights in the J2RF, in light of the existing wells of Exxon and Shell which probably were draining gas from the Texaco leasehold. It seems clear, however, that knowledge of the perimeter of J2RF and the geological character of the reservoir was available to Texaco prior to the time it drilled the A-11 well, as well as knowledge of the limited area of J2RF underlying the Texaco lease. It is without cavil that the A-11 well was drilled solely to protect the correlative rights of Texaco in the J2RF. After A-11 went into production, Exxon and Shell would each have been prudent to have drilled an additional well to offset A-11, although it appears that the existing wells were then adequate to deplete the J2RF. The A-11 well was the last well drilled into the J2RF. To forestall the need for drilling any additional wells into the J2RF, the Conservation Manager directed unitization of J2RF, an action within his properly delegated authority and consonant with the principles enunciated in OCSLA.

It is a undeniable that the decision of a lessee to drill a well is purely a business decision and that the risks of a nonprofitable venture must be faced by the lessee alone. Thus, if the lessee does not recoup its costs because of a nonprofitable well, it has no recourse. Similarly, where a well is drilled into a competitive reservoir, for which a unit agreement is later created with allocation of production based on the original productive net acre-feet, the operator of such a well cannot be heard to complain that it has been short-changed because its well overproduces beyond the allocated resource underlying its lease and that it must, under the unit agreement, share the greater part of its production with the other members of the unit agreement.

It has not been suggested by anyone that the prolific production from A-11 came only from the J2RF underlying the Texaco lease. Nor has it been shown that Texaco has been injured to its detriment because of earlier production from J2RF by Exxon and Shell with consequent drainage from the Texaco leasehold, where Texaco did receive the equivalent of the gas produced from the productive net acre-feet of gas-bearing sand in J2RF underlying its leasehold prior to
production from the reservoir.
must be pointed out that appellan
admitted that the increase in co
attributable to the use of 4½-in
tubing as opposed to more stan
ard sizes was "virtually insigni
cant" in relation to the total cost
the well.

Moreover, we note that wh
Texaco and Gulf both argued th
they had, in some degree, increas
the total unit production from t
reservoir through use of 4½-in
tubing (a contention denied by a
pellants), they admitted that su
an increase was incapable of qua
tification. While we recognize t
difficulties inherent in any attem
to so quantify, we think it equa
obvious that absent a determined
lationship between the 4½-in
tubing and total recovery, app
lants' method of allocating prod
tion, viz., 50 percent net acre-f
and 50 percent current produc
ity, is inherently arbitrary. With
an established quantified ben
there is no reasonable basis
choose between a 50/50, a 90/10
a 10/90 basis of allocation. W
appellants have criticized the
allocation as clearly erroneous,
demonstrably apparent that the
location which they advocate is
self, intrinsically flawed given
facts presently available.

We recognize that situations
arise in which recourse to a
acre-foot allocation will not fa
treat all unit participants.
hold, however, that where an
dividual seeks to force GS to ut
a method of allocation other t

net acre-feet, it is the obligation of the individual to clearly establish the superiority of its method of allocation given the specific factual milieu of each unitization. This has not been done here.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

DOUGLAS E. HENRIQUES
Administrative Judge

WE CONCUR:

JAMES L. BURSKI
Administrative Judge

EDWARD W. STUEBING
Administrative Judge

EFFECT OF THE CRUDE OIL WINDFALL PROFIT TAX ACT OF 1980 ON THE STATES' SHARE OF FEDERAL OIL ROYALTIES

M-36929

December 30, 1980

Mineral Leasing Act: Royalties—Oil and Gas Leases: Royalties

The Crude Oil Windfall Profit Tax Act, P.L. 96-223, 94 Stat. 229 (1980) imposes the windfall profit tax on Federal oil royalty revenue. The states have no economic interest, as that phrase is used in the Windfall Profit Tax Act, in Federal royalty revenue that would exempt their share from taxation. Moreover, revenue from the windfall profit tax cannot be treated as royalty revenue and be distributed to the states under sec. 35 of the Mineral Leasing Act, *as amended*, 30 U.S.C. § 191 (1976). Accordingly, the states' share of Federal oil royalties must be based upon after-tax royalty revenue.

To: Secretary
From: Solicitor
Subject: Effect of the Crude Oil Windfall Profit Tax Act of 1980 on the States' Share of Federal Oil Royalties

This memorandum explains the legal basis of our prior, informal conclusions regarding the effect of the Crude Oil Windfall Profit Tax Act (the "Act"), Pub. L. No. 96–223, 94 Stat. 229 (1980), on the states' share of federal oil royalties. Although the Act exempts oil in which states hold an economic interest, it imposes the windfall profit tax on the federal economic interest in oil royalties. We conclude that the states have no economic interest, as that phrase is used by the Act, in federal royalty revenue that would exempt their share from taxation. Moreover, revenue from the windfall profit tax cannot be treated as royalty revenue and be distributed to the states under the provisions of the Mineral Leasing Act of 1920, *as amended*, 30 U.S.C. § 181 *et seq.* Thus, as the Act's legislative history confirms, the states' share of federal oil royalties must be based upon after-tax royalty revenue.

The Act reduces, by the amount of the excise tax, the additional revenue the Federal Government, and in turn the states, will receive from the price increases produced by decontrol. Recently, the U.S. Geological Survey estimated that the windfall profit tax will take a steadily greater portion from Wyoming's share of federal royalties, from $25 million in Fiscal Year 1981, to $39.3 million in Fiscal Year 1985. Yet despite declining production throughout the period, the Survey estimates that Wyoming's share of after-tax royalty revenue will increase from $101.2 million in Fiscal Year 1981 to $156.8 million in Fiscal Year 1985.

I. THE CRUDE OIL WINDFALL PROFIT TAX ACT AND THE DISPOSITION OF FEDERAL ROYALTY REVENUE UNDER THE MINERAL LEASING ACT

The Crude Oil Windfall Profit Tax Act imposes an excise tax on the increased revenues that will result from the scheduled decontrol of domestic crude oil prices. The Act taxes all domestic oil other than "exempt oil". The Act identifies four categories of exempt oil, which comprise the sole exemptions from the windfall profit tax. *See* sec. 4996(g). The first category exempts "any crude oil from a qualified governmental interest." Secs. 4991 (a), (b). Sec. 4994(a) defines a qualified governmental interest as "an economic interest in crude oil" held by a State or one of its political subdivisions. Accordingly, the Act exempts oil in which a state holds an economic interest, but taxes oil in which the Federal Government owns an economic interest.

The states derive their share in federal royalty revenue from sec. 35 of the Mineral Leasing Act of 1920, *as amended*, 30 U.S.C. § 191. Sec. 35 provides a formula for the distribution of federal royalty payments after their receipt:

> All money received from * * * royalties * * * shall be paid into the Treasury of the United States; 50 per centum thereof shall be paid by the Secretary of the Treasury * * * to the State * * * within the boundaries of which the leased lands or deposits are or were located.

The Windfall Profit Tax Act and the Mineral Leasing Act relate in two ways that possibly could allow the State's share to be calculated on the basis of pre-tax federal royalty revenue. The first way is the meaning of "economic interest" as used in the Windfall Profit Tax Act. If sec. 35 grants states an economic interest, within the meaning of the Act, in the royalty share of crude oil produced from federal leases, then the states' share will be exempt under the Act and will be calculated from pre-tax royalty revenue. The second way is the treatment of windfall profit tax revenue under the Mineral Leasing Act. If Congress intended the revenue attributable to the excise tax on federal royalties to be treated as royalty revenue and distributed under the sec. 35 formula, then the states' share should be based on pre-tax revenue. Otherwise, the states' share must be calculated from after-tax federal royalty revenue.

A. *The Meaning Of "Economic Interest" As Used by The Windfall Profit Tax Act*

The legislative history of the Act indicates that Congress intended the phrase "economic interest" to mean what it does under Federal income tax law. The Senate Report states "[w]hether a particular taxpayer owns an economic interest in oil is determined under the same rules that apply for Federal income tax purposes." Sen. Rept. No. 96-394, Nov. 1, 1979 (H.R. 3919), p. 60. The concept of an economic interest in a mineral deposit as well established in Federal income tax law in the context of the depletion allowance and the distinction between ordinary income and capital gains. *See Rutledge* v. *United States*, 428 F.2d 347, 351 (5th Cir. 1970). In *Palmer* v. *Bender*, 287 U.S. 551 (1933), the United States Supreme Court enunciated the principles that since have consistently been applied to determine whether an entity has an economic interest in a mineral deposit. The depletion deduction is allowed only to one who "has acquired, by investment, any interest in the oil in place, and secures, by any form of legal relationship, income derived from the extraction of oil, to which he must look for a return of his capital." 287 U.S. 557. These two factors are the elements of an economic interest. *Commissioner* v. *Southwest Exploration Co.*, 350 U.S. 308, 314 (1956). *See Parsons* v. *Smith*, 359 U.S. 215 (1959) and cases cited therein at 221, n. 7.

The Treasury regulations also discuss what constitutes an economic interest in a mineral deposit. 26 CFR 1.611-1(b)(1) states that:

> A person who has no capital investment in the mineral deposit * * * does not possess an economic interest merely because through a contractual relation he possesses a mere economic or pecuniary advantage derived from production. For example, an agreement between the owner of an economic interest and another entitling the latter to purchase or process the product upon production or entitling the latter to compensation for extraction or cutting does not convey a depletable economic interest.

See Paragon Coal Co. v. *Commissioner*, 330 U.S. 624, 635-36 (stating that this regulation, which survived through successive amendments of the Internal Revenue Code, is entitled to great weight). The Temporary Excise Tax Regulations promulgated pursuant to the Act track the regulations pertaining to the depletion allowance. The Act provides that the producers of crude oil pay the windfall profit tax. Sec. 4986(b). The excise tax regulations define "producer" as "the holder of the economic interest with respect to the crude oil in place in the ground." 45 F.R. 23395 (Apr. 4, 1980).

From the cases applying the definition of an economic interest developed by the Supreme Court and adopted by the Treasury regulations, a clear pattern has emerged. With rare exceptions, the person found to own an economic interest is within the chain of title of a leasehold or fee interest. A lessor who has reserved royalties retains an economic interest in the oil necessary for the satisfaction of the royalties. *Kirby Petroleum Co.* v. *Commissioner*, 326 U.S. 599, 604 n. 6. But shareholders of corporations owning mineral deposits, *Helvering* v. *O'Donnell*, 303 U.S. 370 (1938); miners who have contracted to operate a mine, *Paragon Jewel Coal Co.* v. *Commissioner*, 380 U.S. 624 (1965), *Parsons* v. *Smith*, 359 U.S. 215 (1959); purchasers of the mineral, *Filtrol Corp.* v. *United States*, 487 F. 2d 536 (Ct. Cl. 1973), *CBN Corp* v. *United States*, 364 F. 2d 393 (Ct. Cl. 1966); and processors of the mineral, *Helvering* v. *Bankline Oil Co.*, 303 U.S. 362 (1938), *Utah Salt Co.* v. *Wise*, 370 F. 2d 976 (10th Cir. 1967); have no economic interests in the mineral deposits.

Nonetheless, the Supreme Court has stated that title to oil in place is not determinative of economic interest. *Kirby Petroleum Co.* v. *Commissioner*, 326 U.S. at 604. If an entity's relationship to the mineral property is sufficiently close, the exceptional case may recognize that the entity holds an economic interest in the minerals even though the entity does not hold normally recognized property rights. Important factors include the entity's control over the property and the extraction and marketing processes, the degree of exclusivity of the entity's interest, and the duration of the interest. P. Irwin, "Selected Current Tax Problems of Oil and Gas", *Nineteenth Annual Institute On Oil and Gas Laws*, 295, 343 (Sw. L. Foundation ed 1968). *See Commissioner* v. *Southwest Exploration Co.*, 350 U.S. 308 (1956) (adjacent owner who had made essential contribution to leasing production by providing the only possible drilling site had an economic interest).

The states' expectation of an economic advantage from federal leases arises solely from sec. 35, 30 U.S.C. § 191, not from their relationship to the mineral deposits. The legislative history of the Mineral Leasing Act of 1920 makes clear that Congress intended the royalty revenue distribution provision to compensate the states for the loss of real estate tax revenues resulting from the continued federal ownership of land in the states. *See* Remarks of Representative Mondell, 58 Cong. Rec. 7772–7774 (1919); *See also* 51 Cong. Rec. 16428–16429 (1914). Congress evinced no intention that sec. 35 convey an interest in the federal mineral properties to the states. The states are not parties to federal leases, nor do they hold property interests in federally owned mineral deposits. The states do not control federally owned minerals or the extraction and marketing of those minerals. States have no pecuniary or legal interest in federally owned oil until that oil is leased, extracted and the royalty payments are made to the federal government. In sum, sec. 35 simply provides for the disposition of federal royalty revenue: it does not confer on states an economic interest in the oil in place within the meaning of the Windfall Profit Tax Act.

B. Treatment Of Windfall Profit Tax Revenues Under The Distribution Provision Of The Mineral Leasing Act

Sec. 35 of the Mineral Leasing Act specifically provides for the sharing of "money received from * * * royalties." Money paid into the Treasury pursuant to the Crude Oil Windfall Profits Tax Act is not "money received from * * * royalties", but instead is tax revenue. Whether the windfall profit tax is paid to the U.S. Geological Survey depends upon the Treasury Department rules. Even if it is paid to the Survey, it is received as tax revenue rather than as money from royalty. Consequently, it never becomes subject to the revenue redistribution provisions of the Mineral Leasing Act. Any other result would create anomalous situations. For example in Alaska, where 90% of the royalty receipts are passed to the state, the federal government could be in a position where it would be required to distribute royalties and pay taxes in amounts that would exceed the total economic interest of the United States in the crude oil.

II. CONGRESSIONAL DISCUSSION OF THE WINDFALL PROFIT TAX ACT'S IMPACT ON STATE TREASURIES

Congress clearly understood the effect of taxing federal royalty revenue that otherwise would have been paid to the states under the formula in the Mineral Leasing Act. During the Senate debate on the conference report on H.R. 3919, which became the Windfall Profit Tax Act, Senator Schmitt summarized the legislative history regarding the taxation of federal royalties:

> **Under the House bill, Federal royalty oil was subject to the windfall profit tax. On the Senate floor, however, Senator Long added an amendment to H.R. 3919 which exempted all oil production owned by the Federal Government. At the time, Senator Long stated that this exemption involved only a bookkeeping change; it would reduce total windfall profit tax receipts, but it would increase Federal royalty receipts by the same amount.**
>
> **Senator Long asserted, and I am certain asserted in good faith, that this exemption would involve no revenue loss, since it was merely shifting Federal money from one pocket to another.**
>
> **As I indicated earlier, and as Senator Long has indicated in his remarks of March 20, when the bill was in conference, he learned that he had been in error in stating that the exemption for Federal royalty oil involved no revenue impact. To avoid any appearance that he had tried to gain an unfair advantage for the States, Senator Long moved that the Senate recede to the House bill on this point.**
>
> **Senator Long's motion was accepted, as I understand it, without any lengthy discussion. And, accordingly, under the conference report, *Federal royalty oil is subject to the windfall profit tax and the amount of revenue the States will receive from this source will be reduced accordingly.* Cong. Rec. S2826 (daily ed. Mar. 21, 1980) (Italics added)**

The Joint Explanatory Statement of the Committee of Conference on H.R. 3919 confirms Senator Schmitt's remarks:

> The conference agreement follows the * * * House bill with respect to oil owned by the Federal government. Cong. Rec. H. 1717 (daily ed. Mar. 10, 1980)

Congress also recognized that the Act would significantly affect state treasuries. During the Senate debate, in response to questions by Senator Schmitt and Senator Wallop, Senator Long noted that the failure to exempt Federal royalty oil from the tax would cost the states $2 billion. He estimated that 49% of this reduction would come from revenues which Wyoming would otherwise have received. Remarks of Senator Long, Cong. Rec. S3030–3031 (daily ed. Mar. 26, 1980). *See generally* remarks of Senators Wallop and Long, Cong. Rec. S2623–2624 (daily ed. Mar. 19, 1980); remarks of Senator Long, Cong. Rec. S2714–2715 (daily ed. Mar. 20 1980); remarks of Senator Schmitt, Cong. Rec. S2825–2827 (daily ed. Mar. 21, 1980); remarks of Senator Long, Cong. Rec. S3030–3031 (daily ed. Mar. 26, 1980).

Senator Long's figures greatly exceed a recent U.S. Geological Survey estimate. The estimated Wyoming mineral revenue data compiled by the Survey indicate that the windfall profit tax will reduce Wyoming's share of federal royalties by $25 million in Fiscal Year 1981; $32 million in Fiscal Year 1982; $35.5 million in Fiscal Year 1983; $37.3 million in Fiscal Year 1984; and $39.3 million in Fiscal Year 1985.

III. CONCLUSION

The Act's legislative history c
firms its language: the Act impo
the windfall profit tax on fede
oil royalty revenue, and accordin
requires calculation of the stat
share of federal royalties up
after-tax royalty revenue. The
has a substantial impact on st
treasuries. Yet the legislative h
tory of the Act makes the conc
sion that Congress intended s
substantial reduction in the stat
share of federal royalties inesc
able.

The windfall profit tax, h
ever, reduces only a portion of
additional revenue that the sta
will receive from the price increa
produced by decontrol. Accordi
to the U.S. Geological Survey e
mate discussed above, production
oil in Wyoming will decline ste
ily from 68.5 million bbls. in Fis
Year 1981 to 61.5 million bbls.
Fiscal Year 1985. Nonethel
Wyoming's share of federal
royalties will increase through
that period. After deducting
windfall profit tax from federal
royality revenue, the Survey e
mates that Wyoming will rece
$101.2 million in Fiscal Year 1
$128 million in Fiscal Year 1
$140.6 million in Fiscal Year 1
$149.2 million in Fiscal Year 1
and $156.8 million in Fiscal Y
1985. Thus, by 1985 Wyoming
enjoy a 50% increase in its shar
federal royalty revenue.

CLYDE O. MARTZ
Solicito

EFFECT OF THE CRUDE OIL WINDFALL PROFIT TAX ACT OF 1980 ON THE STATES' SHARE OF FEDERAL OIL ROYALTIES

December 30, 1980

Wyoming Mineral Royalty Revenues

(Data in millions)

Production period	Commodity	Estimated production	Estimated value/unit	Estimated gross value	Average royalty (percent)	Estimated total royalty revenue	50 percent to State of Wyoming
Oct. 1980 thru Mar. 1981.	Oil	[1] 34.5	[1] $27.00	$931.5	12.5	$116.5	$58.2
	Gas	[2] 150.0	[2] 1.50	225.0	12.5	28.1	14.0
	Coal	[3] 22.0	[3] 9.50	209.0	2.6	5.5	2.8
	Sodium	[3] 1.3	[3] 68.00	86.0	5.0	4.3	2.2
	Others:						
	W.P. tax					(23.0)	(11.5)
	Rents and bonuses			6.0			3.0
Total—1st payment, FY 1981							68.7
Apr. 1981 thru Sep. 1981.	Oil	[1] 34.0	[1] $32.00	$1,088.0	12.5	$136.0	$68.0
	Gas	[2] 155.0	[2] 1.65	255.8	12.5	32.0	16.0
	Coal	[3] 25.0	[3] 10.00	250.0	2.5	6.5	3.3
	Sodium	[3] 1.3	[3] 68.00	90.0	5.0	4.5	2.2
	Others:						
	W.P. tax					(27.0)	(13.5)
	Rents and bonuses			6.0			3.0
Total—2nd payment, FY 1981							79.0
Oct. 1981 thru Mar. 1982.	Oil	[1] 33.5	[1] $37.00	$1,239.5	12.5	$155.0	$77.5
	Gas	[2] 160.0	[2] 1.80	288.0	12.5	36.0	18.0
	Coal	[3] 27.0	[3] 11.00	297.0	2.7	8.1	4.0
	Sodium	[3] 1.3	[3] 69.00	92.0	5.0	4.6	2.3
	Others:						
	W.P. tax					(31.0)	(15.5)
	Rents and bonuses			6.0			3.0
Total—1st payment, FY 1982							89.3
Apr. 1982 thru Sep. 1982.	Oil	[1] 33.0	[1] $40.00	$1,320.0	12.5	$165.0	$82.5
	Gas	[2] 165.0	[2] 1.95	321.8	12.5	40.2	20.1
	Coal	[3] 30.0	[3] 11.00	330.0	2.7	9.0	4.5
	Sodium	[3] 1.4	[3] 69.00	94.0	5.0	4.7	2.3
	Others:						
	W.P. tax					(33.0)	(16.5)
	Rents and bonuses			6.0			3.0
Total—2nd pay-FY 1982							95.9

See footnotes at end of table.

best copy available

Wyoming Mineral Royalty Revenues—Continued

(Data in millions)

Production period	Commodity	Estimated production	Estimated value/unit	Estimated gross value	Average royalty (percent)	Estimated total royalty revenue	50 percent to State of Wyoming
Oct. 1982 thru Mar. 1983	Oil	[1] 33.0	[1] $42.00	$1,386.0	12.5	$173.2	$86.6
	Gas	[2] 170.0	[2] 2.10	357.0	12.5	45.0	22.5
	Coal	[3] 31.0	[3] 12.00	372.0	2.7	10.2	5.1
	Sodium	[3] 1.4	[3] 69.00	97.0	5.0	4.8	2.4
	Others:						
	W.P. tax					(35.0)	(17.5)
	Rents and bonuses			6.0			3.0
Total—1st Payment, FY 1983							102.1
Apr. 1983 thru Sep. 1983	Oil	[1] 32.5	[1] $44.00	$1,430.0	12.5	$179.0	$89.5
	Gas	[2] 175.0	[2] 2.25	393.8	12.5	49.2	24.6
	Coal	[3] 33.0	[3] 12.00	396.0	2.8	11.2	5.6
	Sodium	[3] 1.6	[3] 70.00	112.0	5.0	5.6	2.8
	Others:						
	W.P. tax					(36.0)	(18.0)
	Rents and bonuses			6.0			3.0
Total—2nd Payment, FY 1983							107.5
Oct. 1983 thru Mar. 1984	Oil	[1] 32.0	[1] $46.00	$1,472.0	12.5	$184.0	$92.0
	Gas	[2] 180.0	[2] 2.40	432.0	12.5	54.0	27.0
	Coal	[3] 35.0	[3] 13.00	455.0	2.8	12.6	6.3
	Sodium	[3] 1.7	[3] 71.00	120.7	5.0	6.1	3.0
	Others:						
	W.P. tax					(36.8)	(18.4)
	Rents and bonuses			6.0			3.0
Total—1st payment, FY 1984							112.9
Apr. 1984 thru Sep. 1984	Oil	[1] 31.5	[1] $48.00	$1,512.0	12.5	$189.0	$94.5
	Gas	[2] 185.0	[2] 2.55	471.8	12.5	59.0	29.5
	Coal	[3] 37.0	[3] 13.00	481.0	2.8	13.3	6.6
	Sodium	[3] 1.8	[3] 71.00	127.8	5.0	6.4	3.2
	Others:						
	W.P. tax					(37.8)	(18.9)
	Rents and bonuses			6.0			3.0
Total—2nd payment, FY 1984							117.9
Oct. 1984 thru Mar. 1985	Oil	[1] 31.00	[1] $50.00	$1,550.0	12.5	$193.8	$96.9
	Gas	[2] 190.0	[2] 2.70	513.0	12.5	64.1	32.0
	Coal	[3] 39.0	[3] 14.00	546.0	5.5	30.0	15.0
	Sodium	[3] 1.8	[3] 72.00	129.6	5.0	6.5	3.3
	Others:						
	W.P. tax					(38.8)	(19.4)
	Rents and bonuses			6.0			3.0
Total—1st payment, FY 1985							130.8

See footnotes at end of table.

Wyoming Mineral Royalty Revenues—Continued

(Data in millions)

Production period	Commodity	Estimated production	Estimated value/unit	Estimated gross value	Average royalty (percent)	Estimated total royalty revenue	50 percent to State of Wyoming
Apr. 1985 thru Sep. 1985	Oil	[1] 30.5	[1] $52.00	$1,586.0	12.5	$198.3	$99.2
	Gas	[2] 195.0	[2] 2.85	555.8	12.5	69.5	34.8
	Coal	[3] 41.0	[3] 14.00	574.0	5.5	31.6	15.8
	Sodium	[3] 1.9	[3] 72.00	136.8	5.0	6.8	3.4
	Others:						
	W.P. tax					(39.7)	(19.9)
	Rents and bonuses			6.0			3.0
Total—2nd payment, FY 1985							136.3

NOTE: Rents and bonuses corrected 10/27/80.

[1] Per barrel.

[2] In millions cubic feet.

Per ton.

FALCON COAL CO., INC.

2 IBSMA 406

Decided *December 31, 1980*

Appeal by the Office of Surface Mining Reclamation and Enforcement from a May 15, 1980, decision by Administrative Law Judge David Torbett vacating Notice of Violation No. 79-2-61-29 (Docket No. NX 0-77-R) and the civil penalty assessment (Docket No. NX 0-65-P) on the basis of lack of jurisdiction over the Falcon Coal Company operation.

Reversed.

1. Surface Mining Control and Reclamation Act of 1977: Tipples and Processing Plants: In Connection With—Surface Mining Control and Reclamation Act of 1977: Words and Phrases

"*Surface coal mining operations.*" A coal loading facility operated and controlled by the same company that owns and operates the mines supplying coal to it is being conducted "in connection with" a surface coal mine within the meaning of "surface coal mining operations" in 30 CFR 700.5.

2. Surface Mining Control and Reclamation Act of 1977: Tipples and Processing Plants: At or Near a Minesite—Surface Mining Control and Reclamation Act of 1977: Words and Phrases

"*Surface coal mining operations.*" Where a coal loading facility is found to be operated in connection with several neighboring coal mines but is 11.2 miles distant from the closest of those mines, the facility may be "near" a minesite within the meaning of "surface coal mining operations" in 30 CFR 700.5.

APPEARANCES: Randall S. May, Esq., Craft, Barret & Haynes, Hazard, Kentucky, for Falcon Coal Company, Inc.; Carol S. Nickle, Esq., Office of the Field Solicitor, Knoxville, Tennessee, Marianne D. O'Brien, Esq., and Marcus P. McGraw, Esq., Assistant Solici-

tor for Enforcement, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

The Office of Surface Mining Reclamation and Enforcement (OSM) has sought review of a decision of Administrative Law Judge David Torbett vacating Notice of Violation No. 79-2-61-29, issued to Falcon Coal Co., Inc. (Falcon), pursuant to sec. 521(a)(3) of the Surface Mining Control and Reclamation Act of 1977 (Act),[1] and citing three violations of the initial program regulations. For the reasons discussed below, we reverse that decision.

Background

On Dec. 11, 1979, OSM inspected Falcon's Haddix Continuous Loading Facility in Breathitt County, Kentucky, and issued Notice of Violation No. 79-2-61-29. The notice charged three violations: Violation 1, for allegedly failing to post site identification signs as required by 30 CFR 715.12(c); and violations 2 and 3, for allegedly failing to pass all surface drainage through a sedimentation pond or series of sedimentation ponds, and allegedly failing to meet effluent limitations, both in violation of 30 CFR 715.17(a). A proposed assessment of a civil
penalty was subsequently issued b
OSM.[2]

On Jan. 14, 1980, Falcon filed a
application for review of the notic
(Docket No. NX 0-77-R), pursu
ant to sec. 525 of the Act (30 U.S.C
§ 1275 (Supp. II 1978)). On Feb.
1980, Falcon filed a petition for re
view of the proposed civil penalt
assessment pursuant to sec. 518 o
the Act (30 U.S.C. § 1268 (Supp
II 1978)) (Docket No. NX 0
65-P). The application and petitio
were consolidated for a hearing
which was conducted on Apr. 3
1980, in London, Kentucky.

* * *

The sole issue litigated at th
hearing was whether OSM ha
jurisdiction over Falcon's Haddi
Continuous Loading Facility. Pend
ing the decision on the jurisdictiona
question, the parties agreed tha
(1) all three violations occurred
(2) violations 2 and 3 would b
combined into one violation; an
(3) the total civil penalty would b
$2,500 (Tr. 6). At the conclusion o
OSM's presentation of its case, Fa
con moved to vacate the notice o
violation arguing that OSM faile
to show that coal processing plan
were subject to the Act and, ther
fore, OSM lacked jurisdiction ov
Falcon's facility. The Administr
tive Law Judge granted the motio
and ordered that the notice of vi
lation and proposed civil penal

---

[1] Act of Aug. 3, 1977, 91 Stat. 445, 30 U.S.C. § 1271(a)(3) (Supp. II 1978).

[2] On Jan. 17, 1980, Falcon received a not
of proposed assessment for Notice of Violat
No. 79-2-61-29. The penalties assessed
OSM were as follows: Violation 1, $480; v
lation 2, $2,800; violation 3, $2,800. Tot
$6,080.

assessment be vacated. On May 15, 1980, he issued a written confirmation of his oral decision. On June 16, 1980, OSM filed a timely notice of appeal.

The following facts are undisputed by the parties. The Continental Illinois Leasing Corp. (C.I.L.C.), owns the Haddix Continuous Loading Facility and leases it to Falcon. As part of a coal purchase agreement, Falcon operates the facility and the lease rental payments are made to C.I.L.C. by the Tennessee Valley Authority (TVA). The activities conducted at the plant are limited to the loading and crushing of coal (Answers to Interrogatory No. 7). The operations at the facility began in May 1973 and are permitted by the Commonwealth of Kentucky.

As of the date of OSM's inspection, all coal hauled to the facility came from mines owned and operated by Falcon in Breathitt County, Kentucky (Tr. 14). The nearest minesite is 11.2 miles from the loading facility (Tr. 18, 19); the farthest, 18 miles (Answer to Interrogatory No. 10). The facility has no physical connection with, nor is it adjacent to, any minesite or mining operation of the applicant (Tr. 19, 20). The facility is used solely in connection with coal to be delivered to TVA under the coal purchase contract between TVA and Falcon.

Discussion

In *Drummond Coal Co.*, 2 IBSMA 96, 101, 87 I.D. 196, 198 (1980), we stated a two-part test for determining whether a coal processing or loading facility constitutes "surface coal mining operations" within the meaning of the term in 30 CFR 700.5.[3] The facility must be operated "in connection with" a mine and be located "at or near the minesite." OSM argues that the facts of the instant case meet the two tests and that *Drummond* is dispositive of the issue because the activities at Falcon's facility and its surface mines are one common operation. Although not exactly like those in *Drummond*, the facts here lead us to only a very small variation of our holding there. That is also entirely consistent with our holding in the similar case of *Bethlehem Mines Corp.*, 2 IBSMA 215, 87 I.D. 380 (1980).

In *Drummond*, the Board concluded that where a coal processing facility is owned by the same company that owns the mines that supply coal to it, that facility may conduct activities "in connection with" a surface coal mine within the meaning of 30 CFR 700.5. We did note, however, that there may be "other relationships" that would suffice to establish a "connection" between an activity and a surface coal mine. *Drummond*, 2 IBSMA at 101, 87 I.D. at 198.

---

[3] 30 CFR 700.5 reads in pertinent part:

"*Surface coal mining operations* means—

"(a) *Activities conducted* on the surface of lands *in connection with a surface coal mine* or, subject to the requirements of Section 516 of the Act, surface operations and surface impacts incident to an underground coal mine, the products of which enter commerce or the operations of which directly or indirectly affect interstate commerce. Such activities include excavation for the purpose of obtaining coal, including such common methods as contour, strip, auger, mountaintop removal, box cut, open pit, and area mining, the uses of explosives and blasting, and in situ distillation or retorting, leaching or other chemical or physical processing, and the cleaning, concentrating, or other processing or preparation. loading of coal for interstate commerce *at or near the mine-site.*" (Italics added.)

Among other such relationships that may exist, the Board has recognized that "[a] contract, lease, or sell-back arrangement * * * may be sufficient to establish a connection between a coal mine and a processing facility," but the nature of the arrangement must be proved. *Virginia Iron, Coal and Coke Co.*, 2 IBSMA 165, 171, 87 I.D. 327, 330 (1980).

Such an arrangement was established by OSM in *Bethlehem Mines Corp.* In that case the land on which the tipple was located was owned by a railroad and leased to Bethlehem. The facility was operated by a third party under contract with Bethlehem. In the year immediately preceding the issuance of the notice of violation, approximately 95 percent of the coal loaded through the facility came from Bethlehem's mine. The situation is nearly identical with that in this case, with the exception that the operation of the facility in *Bethlehem* was by a third party. Although the facility was neither owned nor operated by Bethlehem, as was the case in *Drummond*, Bethlehem controled the facility through its lease from the railroad and contract with the third party. Such control, the Board concluded, combined with Bethlehem's use of the facility to load coal from its own mine was "sufficient to establish that the facility [was] operated in connection
with [the] mine within the mea
ing of 30 CFR 700.5." *Bethlehe*
2 IBSMA at 220, 87 I.D. at 382.

[1] As noted, there is a similari
between the facts in *Bethlehem* a
those in the instant case. That sin
larity coupled with the "other re
tionships" (*Drummond*, 2 IBSM
at 101, 87 I.D. at 198), namely t
operation of the facility by Falc
leads the Board to conclude that t
loading facility is operated "in c
nection with" Falcon's coal mines
contemplated under 30 CFR 70

[2] Falcon's facility is also
cated "at or near the minesite." T
Board held in *Drummond* that
processing facility, 9 to 30 mi
from functionally integrated a
commonly owned mines supplyi
it, was "near" those mines wit
the meaning of 30 CFR 700.5. He
the mines are similarly related a
owned and are from 11.2 to 18 mi
from the loading facility. The lo
ing facility is, therefore, "near"
minesites within the meaning
"surface coal mining operations"
30 CFR 700.5.

The decision of the Hearings
vision vacating Notice of Violat
No. 79–2–61–29 is reversed, an
civil penalty of $2,500, as agr
upon to by the parties, is asses

MELVIN J. MIRKIN
Administrative Judg

WILL A. IRWIN
Chief Administrative Judg

NEWTON FRISHBERG
Administrative Judg

U.S. GOVERNMENT PRINTING OFFICE : 1981 O - 336-182

INDEX-DIGEST

(Note—See front of this volume for tables)

ACCOUNTS Page

(*See also* Fees, Funds, Payments—if included in this Index.)

FEES AND COMMISSIONS

1. Management overhead costs are not recoverable from right-of-way applicants under 43 CFR 2802.1-2 473

PAYMENTS

1. Management overhead costs are not recoverable from right-of-way applicants under 43 CFR 2802.1-2 473

ADMINISTRATIVE PRACTICE

1. Decisions of the Interior Board of Land Appeals are indexed, digested, and available for public inspection pursuant to published Departmental regulations. They meet the requirements of the Administrative Procedure Act and serve as binding Departmental precedents. However, adjudicative decisions by local Bureau of Land Management offices do not meet requirements of the Administrative Procedure Act and are not binding precedents 110

ADMINISTRATIVE PROCEDURE

(*See also* Appeals, Confidential Information, Contests & Protests, Hearings, Judicial Review, Public Records, Regulations, Rules of Practice—if included in this Index.)

GENERALLY

1. Any document which is sent by certified mail to an individual at his record address is considered to have been served at the time of return by the post office of the undelivered certified letter, such constructive service being equivalent in legal effect to actual service of the document 610

ADJUDICATION

1. Where the holder of a coal prospecting permit completes his exploration and applies for a preference right coal lease in 1973, the application must be adjudicated on the basis of the applicant's subsequent conformity with regulations amended in 1976 with retroactive effect. However, where the application is summarily rejected solely for the reason that the applicant's supplemental submission is "inadequate," without identifying the deficiency, the decision will be vacated and the case remanded for readjudication 14
2. Where the Government contests the validity of a mining claim for nonperformance of annual assessment work, there is nothing inherent or implied in that action which requires a conclusion that the claim is valid in all other respects, nor may the bringing of such an action be treated as tantamount to an admission by the Government that "property rights in the claim have been established by the making of a valid location." 249

ADMINISTRATIVE PROCEDURE—Continued

BURDEN OF PROOF

1. Where the Government contests mining claims on a charge of la
discovery of a valuable mineral deposit prior to the date when
minerals were no longer subject to location, the claimant, as prop
of the rule, has the ultimate burden of proof as to validity of the c
The Government, however, must initially present sufficient evi
to establish a prima facie case. The burden then shifts to the clai
to show by a preponderance of credible evidence that a discover
been made on each claim-----------------------------------

2. The assertion that annual assessment work has not been performed i
assertion of a negative fact. If an examination of the mining claim
the nearby lands does not reveal the accomplishment of the req
work, and there is no record of any such work having been perfor
then evidence to this effect would be sufficient to establish a p
facie case. It would then devolve upon the claimant to show
preponderance of the countervailing evidence that he has substan
complied with the statute-----------------------------------

3. In a Government contest proceeding to determine the validity of a m
claim, the claimant is always the proponent of the rule or orde
ways the one claiming to have earned the benefit of the mining
through his compliance therewith. Regardless of whether the
on which the validity of the claim rests is discovery, mode of loca
or performance of assessment work, the relative position and ob
tion of the contestant and the contestee remain the same--------

4. When the Government contests a mining claim on a charge of lack o
covery of a valuable mineral deposit, it has assumed the burd
going forward with sufficient evidence to establish a prima facie
Where a Government mineral examiner testifies that he has exam
a claim and found the quantity of minerals insufficient to supp
finding of discovery, a prima facie case of invalidity has been e
lished and the burden shifts to the claimants to show by a prepo
ance of the evidence that a discovery has been made------------

5. When the United States contests a mining claim it has by practice ass
only the burden of going forward with sufficient evidence to esta
a prima facie case on the charges in the contest complaint; the bu
then shifts to the contestee to refute, by a preponderance of the
dence, the Government's case-----------------------------------

6. The United States has established a prima facie case of the invalidi
a mining claim when a qualified Government mining examiner tes
that he has examined the claim and found the mineral values in
cient to support the discovery of a valuable deposit-------------

DECISIONS

1. As precedents, decisions of the Board of Land Appeals should be cit
the volume and page number given on the bottom of the page o
decision and not to the IBLA docket number shown on the top o
decision---

2. Decisions of the Interior Board of Land Appeals are indexed, digested
and available for public inspection pursuant to published De
mental regulations. They meet the requirements of the Administr
Procedure Act and serve as binding Departmental precedents.
ever, adjudicative decisions by local Bureau of Land Manage
offices do not meet requirements of the Administrative Proc
Act and are not binding precedents--------------------------

ADMINISTRATIVE PROCEDURE—Continued

HEARINGS — Page

1. Where a corporate simultaneous oil and gas lease offeror alleges no facts which could disprove its failure to comply with 43 CFR 3102.4–1, no hearing will be granted as requested — 110
2. When the Government contests a mining claim on a charge of lack of discovery of a valuable mineral deposit, it has assumed the burden of going forward with sufficient evidence to establish a prima facie case. Where a Government mineral examiner testifies that he has examined a claim and found the quantity of minerals insufficient to support a finding of discovery, a prima facie case of invalidity has been established and the burden shifts to the claimants to show by a preponderance of the evidence that a discovery has been made — 386
3. Where there is not sufficient reason shown to disturb an Administrative Law Judge's finding that the prudent man-marketability test was met as of July 23, 1955, and continuously thereafter by mining claimants who extracted and profitably sold sand and gravel from the claims prior to that date and continuously thereafter, the decision will be sustained on appeal — 387
4. The Board of Land Appeals will not order a further hearing in a mining claim contest case where a patent application has been filed merely because the evidentiary record is inadequate to invalidate the claims for lack of a discovery of a valuable mineral deposit, if the claimant is found to have met the discovery test — 387

ALASKA

NAVIGABLE WATERS

Generally

1. Where the Bureau of Land Management has redetermined that water bodies which are the subject of an appeal are navigable, and where the Board finds that the facts in the record upon which the Bureau of Land Management made its determination meet the essential elements of navigability, and where the facts in the record are undisputed so that no issue of fact as to navigability remains before the Board, then the Board will find the water bodies to be navigable — 341

ALASKA NATIVE CLAIMS SETTLEMENT ACT

ADMINISTRATIVE PROCEDURE

Generally

1. An agreement between selecting Native corporations and a Federal agency, on lands actually used by the Federal agency, cannot be enforced in lieu of a § 3(e) determination by the Bureau of Land Management to compel conveyance to the Native corporations in accord with the agreement. ANCSA by clear language in § 3(e) mandates a Secretarial determination. While the Secretary may delegate, he may not be compelled to relinquish his statutory duty to third parties — 422
2. Where the required § 3(e) determination is crucial to conveyance, where the affected Federal agency and all affected Native corporations agree on the identification of lands actually used by the agency, where the record discloses no inconsistency between the agreement and § 3(e), where the determination has already been delayed for a significant period of time by the lack of implementing regulations and the date of publication of final regulations cannot be ascertained, the Bureau of Land Management may make a § 3(e) determination, relying on the parties' agreement for factual data, in the absence of final regulatory guidelines — 423

ALASKA NATIVE CLAIMS SETTLEMENT ACT—Continued

ADMINISTRATIVE PROCEDURE—Continued

Conveyances

1. When an entry is being excluded from a conveyance for the specific purpose of further adjudication, rather than as recognition of such entry pursuant to 43 CFR 2650.3-1(a), the conveyance document must so state

Decision to Issue Conveyance

1. A redetermination of navigability by the Bureau of Land Management which modifies a published decision is itself a decision requiring publication in accordance with 43 CFR 2650.7
2. When the Bureau of Land Management redetermines its own finding of navigability which would result in a change from its published Decision to Issue Conveyance, and when the Bureau of Land Management has, or is given, jurisdiction to make such redetermination, then that redetermination is itself a decision requiring public notice through publication in accordance with 43 CFR 2650.7
3. Redetermination by the Bureau of Land Management of navigability of water bodies while jurisdiction over the subject water bodies is in the Alaska Native Claims Appeal Board is not a "decision" of the Bureau of Land Management, and notice thereof is not required to be published pursuant to 43 CFR 2650.7
4. Decisions by the Alaska Native Claims Appeal Board, made pursuant to its authority in 43 CFR 4.1(b)(5), are not decisions of the Bureau of Land Management, and notice thereof is not required to be published pursuant to 43 CFR 2650.7
5. Redetermination by the Bureau of Land Management from nonnavigability to navigability of water bodies not the subject of an appeal is a decision "proposing to convey lands," and notice thereof must be given pursuant to 43 CFR 2650.7(d)

Publication

1. A redetermination of navigability by the Bureau of Land Management which modifies a published decision is itself a decision requiring publication in accordance with 43 CFR 2650.7
2. When the Bureau of Land Management redetermines its own finding of navigability which would result in a change from its published Decision to Issue Conveyance, and when the Bureau of Land Management has, or is given jurisdiction to make such redetermination, then that redetermination is itself a decision requiring public notice through publication in accordance with 43 CFR 2650.7
3. Redetermination by the Bureau of Land Management of navigability of water bodies while jurisdiction over the subject water bodies is in the Alaska Native Claims Appeal Board is not a "decision" of the Bureau of Land Management, and notice thereof is not required to be published pursuant to 43 CFR 2650.7
4. Decisions by the Alaska Native Claims Appeal Board made pursuant to its authority in 43 CFR 4.1(b)(5), are not decisions of the Bureau of Land Management, and notice thereof is not required to be published pursuant to 43 CFR 2650.7
5. Redetermination by the Bureau of Land Management from nonnavigability to navigability of water bodies not the subject of an appeal is a decision "proposing to convey lands," and notice thereof must be given pursuant to 43 CFR 2650.7(d)

ALASKA NATIVE CLAIMS SETTLEMENT ACT—Continued

ALASKA NATIVE CLAIMS APPEAL BOARD

Appeals

Decisions Page

1. The Board is bound by statements of policy made by the Secretary of the Interior and contained in a published Departmental Manual Release or in a Secretarial Order published in the *Federal Register* 286, 366, 372

Dismissal

1. Absent reasons justifying continuance of the appeal, an appeal will be dismissed when there remain therein no issues to be resolved by the Board 163
2. Absent reasons justifying continuance of the appeal, an appeal will be dismissed when no issues remain to be resolved by the Board 164
3. Where one issue on appeal is that the Bureau of Land Management erred by excluding certain lands from conveyance without adjudicating the status of such lands, and the appellant and the Bureau of Land Management stipulate to withdrawal of the appeal on condition that the Bureau of Land Management will later adjudicate the status of such lands, then the issue is resolved and the Board will order partial dismissal of the appeals as to that issue 603

Intervention

1. Intervention in proceedings before the Alaska Native Claims Appeal Board is in the discretion of the Board. 43 CFR 4.909(b) 603
2. The Board will not allow intervention following resolution of the issues on appeal 603
3. The Board will not allow introduction of new issues to an appeal by an intervenor 603

Jurisdiction

1. There is no administrative appeal process available to claimants under § 14(c) of ANCSA, and such claims must be brought in a judicial forum 1
2. As an administrative adjudicative body organized to decide appeals under ANCSA, the Board finds all challenges to the validity of ANCSA beyond its jurisdiction 83
3. Interim conveyance and patent are documents of equal significance in the granting of title under ANCSA and its amendments, unless such amendments provide otherwise. Sec. 4(a) of P.L. 94–456 does not authorize the Secretary of the Interior to grant less than full legal title to Cook Inlet Region, Inc. Therefore, when BLM issues interim conveyance to Cook Inlet Region, Inc., pursuant to P.L. 94–456, the Secretary of the Interior and this Board lose jurisdiction of those interests in lands which have been conveyed and cannot maintain control over such lands pending reconveyance by Cook Inlet Region, Inc 219
4. Contractual disputes between the appellant and other corporations are not appeals from findings of Departmental officials within the contemplation of jurisdictional regulations in 43 CFR 4.1(b)(5), nor can they be decided by this Board in connection with such appeals 220
5. Where the State of Alaska has issued patent to a third party on lands tentatively approved to the State under the Alaska Statehood Act, the proper forum to adjudicate the status of such patent is a court, and the Department lacks administrative jurisdiction over the issue 279
6. Where a matter on appeal has been remanded to the Bureau of Land Management for a specific determination, the Board retains jurisdiction over the question of whether or not such a determination has been rendered moot by subsequent actions of the party 422

338-173 0 - 81 - 2

ALASKA NATIVE CLAIMS SETTLEMENT ACT—Continued

Remand

1. Where a matter on appeal has been remanded to the Bureau of Land Management for a specific determination, the Board retains jurisdiction over the question of whether or not such a determination has been rendered moot by subsequent actions of the party

Settlement Approval

1. Where the record is uncontested and supports a factual finding that the United States no longer uses or needs an improvement pursuant to the principles of *Instructions*, 44 L.D. 513 (1916), the Board can accept a stipulation by the parties to remove the reservation of interest from a conveyance document

Standing

1. If the only interest in land claimed by appellants affected by the decision appealed was a terminated or relinquished special use permit, the appellants will be found to lack a property interest in land sufficient to confer standing under regulations in 43 CFR 4.902
2. Where land selections by a Cook Inlet village corporation pursuant to § 12(a) of ANCSA are rejected by the Bureau of Land Management so that such lands may be conveyed to Cook Inlet Regional Corp. which is obligated to reconvey lands to the village under the terms of an amendment to ANCSA, the village corporation's interest in its rejected land selection and in its ultimate right to reconveyance of land constitutes a property interest affected by a determination of the Bureau of Land Management, sufficient to confer standing under regulations contained in 43 CFR 4.902
3. Where the Alaska Gateway School District claims only prospective ownership in lands and there is no evidence in the record that the School District has taken steps to obtain title pursuant to AS 14.08.151(b), the School District cannot be found to claim a property interest in such lands, within the meaning of 43 CFR 4.902, by reason of prospective ownership
4. While a "property interest" sufficient to confer standing under 43 CFR 4.902 need not be a vested interest, it may not be completely speculative

CONVEYANCES

Interim Conveyance

1. Interim conveyance and patent are documents of equal significance in the granting of title under ANCSA and its amendments, unless such amendments provide otherwise. Sec. 4(a) of P.L. 94–456 does not authorize the Secretary of the Interior to grant less than full legal title to Cook Inlet Region, Inc. Therefore, when BLM issues interim conveyance to Cook Inlet Region, Inc., pursuant to P.L. 94–456, the Secretary of the Interior and this Board lose jurisdiction of those interests in lands which have been conveyed and cannot maintain control over such lands pending reconveyance by Cook Inlet Region, Inc

Reconveyances

1. Sec. 14(c) of ANCSA protects certain land uses based on occupancy alone by requiring that village corporations receiving lands pursuant t ANCSA reconvey to the occupants those lands occupied for certai specified purposes
2. Where the appellants' claimed right to use and occupancy of certain lan is based on past use and occupancy of the land, such right might b protected by the reconveyance provisions of § 14(c) if the propose conveyance were to a village corporation

ALASKA NATIVE CLAIMS SETTLEMENT ACT—Continued

CONVEYANCES—Continued

Reconveyances—Continued

Page

3. The Board lacks jurisdiction to decide an appeal based on interests claimed pursuant to § 14(c). There is no administrative appeal process available to claimants under § 14(c), and the only recourse is to a judicial forum 82

4. Where land selections by a Cook Inlet village corporation pursuant to § 12(a) of ANCSA are rejected by the Bureau of Land Management so that such lands may be conveyed to Cook Inlet Regional Corp. which is obligated to reconvey lands to the village under the terms of an amendment to ANCSA, the village corporation's interest in its rejected land selection and in its ultimate right to reconveyance of land constitutes a property interest affected by a determination of the Bureau of Land Management, sufficient to confer standing under regulations contained in 43 CFR 4.902 219

5. Where the Secretary of the Interior and Cook Inlet Regional Corp. execute an agreement setting forth the procedure by which land shall be conveyed to the regional corporation for reconveyance to villages within Cook Inlet Region, and such procedure is authorized by Congress in an amendment to ANCSA, the agreement is binding on the Bureau of Land Management and the BLM is required to convey lands to Cook Inlet Regional Corp. pursuant to the terms of the agreement 219

6. When BLM rejects a village corporation's land selections for the purpose of conveying such lands to Cook Inlet Regional Corp. for reconveyance pursuant to § 4(a) of P.L. 94–456 and associated agreements, the rejection extinguishes the right of the village corporation to receive title from the Federal Government to those lands selected, but does not adjudicate or extinguish the right of the village corporation to receive title from Cook Inlet Region, Inc., to those lands 219

7. The rights of a village corporation in the Cook Inlet Region to receive title from Cook Inlet Region, Inc., to lands for which it had applied pursuant to § 12(a) of ANCSA are determined by the terms of § 4(a) of P.L. 94–456 and associated agreements 219

Valid Existing Rights

Third-Party Interests

1. Where Forest Service permits were terminated for apparent cause (failure to comply with permit conditions), the original holders of the permits no longer have property interests which constitute valid existing rights protected by § 14(g) of ANCSA 1

2. Where the holder of a Forest Service permit requested that his special use permit be cancelled and the Forest Service did so and, subsequently, issued a special use permit for the same lot to another person, the original holder of the permit no longer has a property interest or a valid existing right derived from the permit which is protected under § 14(g) of ANCSA 1

3. Valid existing rights which are protected under § 14(g) of the Alaska Native Claims Settlement Act (ANCSA), 85 Stat. 688, *as amended*, 43 U.S.C. §§ 1601–1628 (1976 and Supp. I 1977), are in all cases derived from and created by the State or Federal Government 82

4. Sec. 22(b) of ANCSA protects rights of use and occupancy pending patent of land upon which lawful entry was made prior to Aug. 31, 1971, for

ALASKA NATIVE CLAIMS SETTLEMENT ACT—Continued

CONVEYANCES—Continued

Valid Existing Rights—Contined

Third-Party Interest—Continued

Page

the purpose of gaining title to a homestead, headquarters site, trade and manufacturing site, or small tract site. Protection under § 22(b) is contingent upon compliance with the appropriate public land law 82

5. Sec. 22(c) of ANCSA provides limited protection for unpatented mining claims, contingent upon compliance with the specified requirements 82

6. Where the appellants have not asserted that they have a lease, contract, permit, right-of-way, or easement issued by the Federal Government or by the State of Alaska, they fail to prove entitlement to the protection provided by § 14(g) of ANCSA 82

7. Where the appellants do not allege entry under, or compliance with, any public land laws, they cannot claim the protection of § 22(b) 82

8. Where the State of Alaska has issued patent to a third party on lands tentatively approved to the State under the Alaska Statehood Act, the proper forum to adjudicate the status of such patent is a court, and the Department lacks administrative jurisdiction over the issue 279

9. Contracts for the sale of real property, issued by the State of Alaska for lands in tentatively approved State land selections under the Statehood Act, are valid existing rights leading to the acquisition of title, protected by exclusion from conveyances to Native corporations under the Alaska Native Claims Settlement Act, as interpreted by Secretary's Order No. 3029 (43 FR 55287 (1978)) 279

10. In the case of unlisted villages a period occurred, after enactment of the Alaska Native Claims Settlement Act and before the villages filed for eligibility, in which tentatively approved land selections of the State of Alaska were not yet withdrawn for potential village selections, and during this period the State could still create third-party interests in such lands 279

11. In the case of unlisted villages, third-party interests created by the State of Alaska on tentatively approved lands after enactment of the Alaska Native Claims Settlement Act are entitled to protection as valid existing rights provided such interests were created before the unlisted village applied for eligibility and lands were withdrawn for it 279

12. Lands tentatively approved for conveyance under the Alaska Statehood Act and leased by the State of Alaska pursuant to its open-to-entry lease program prior to enactment of the Alaska Native Claims Settlement Act must, pursuant to Secretary's Order No. 3029 (43 FR 55287 (1978)), be excluded from conveyance under ANCSA as valid existing rights leading to the acquisition of title 286

13. The policy expressed in Secretary's Order No. 3029 (43 FR 55287 (1978)), is applicable to all lands still within the Department's jurisdiction, even if the decision to convey such lands pursuant to the Alaska Native Claims Settlement Act was issued by the Bureau of Land Management prior to publication of Order No. 3029 286

14. Tentative approval of land selections by the State of Alaska under the Statehood Act was rescinded by the Bureau of Land Management to permit conveyance of the same lands to a Native corporation under the Alaska Native Claims Settlement Act. Subsequently, Secretary's Order No. 3029 (43 FR 55287 (1978)) found that third-party interests

ALASKA NATIVE CLAIMS SETTLEMENT ACT—Continued

CONVEYANCES—Continued

Valid Existing Rights—Continued

Page

Third-Party Interest—Continued

leading to fee title, created by the State in such lands, were valid existing rights which must be excluded from conveyance to the Native corporation. Accordingly, BLM must reinstate tentative approval of the State's selection of such lands so that the State is able to grant title to such third parties as contemplated by Order No. 3029 ------- 286

15. Where lands tentatively approved for conveyance under the Alaska Statehood Act were leased by the State of Alaska pursuant to its open-to-entry lease program prior to enactment of the Alaska Native Claims Settlement Act, such lands must, pursuant to Secretary's Order No. 3029 (43 FR 55287 (1978)), be excluded from conveyance under the Alaska Native Claims Settlement Act because the leases and concurrent purchase options are valid existing rights leading to the acquisition of title ---------------------------------- 366, 372

16. The policy expressed in Secretary's Order No. 3029 is applicable to all lands still within the Department's jurisdiction, even if the decision to convey such lands pursuant to the Alaska Native Claims Settlement Act was issued by the Bureau of Land Management prior to publication of Order No. 3029 -------------------------------- 366, 373

17. Where tentative approval of land selections by the State of Alaska under the Statehood Act was rescinded by the Bureau of Land Management to permit conveyance of the same lands to a Native corporation under the Alaska Native Claims Settlement Act, and subsequently Secretary's Order No. 3029 found that third-party interests leading to fee title, created by the State of Alaska in such lands, were valid existing rights which must be excluded from conveyance to the Native corporation, the Bureau of Land Management must reinstate tentative approval of the State of Alaska's selection of such lands so that the State of Alaska is able to grant title to such third parties as contemplated by Order No. 3029 -- 366, 373

DEFINITIONS

Federal Installation

1. An agreement between selecting Native corporations and a Federal agency, on lands actually used by the Federal agency, cannot be enforced in lieu of a § 3(e) determination by the Bureau of Land Management to compel conveyance to the Native corporations in accord with the agreement. ANCSA by clear language in § 3(e) mandates a Secretarial determination. While the Secretary may delegate, he may not be compelled to relinquish his statutory duty to third parties -------------- 422

2. Where the required § 3(e) determination is crucial to conveyance, where the affected Federal agency and all affected Native corporations agree on the identification of lands actually used by the agency, where the record discloses no inconsistency between the agreement and § 3(e), where the determination has already been delayed for a significant period of time by the lack of implementing regulations and the date of publication of final regulations cannot be ascertained, the Bureau of Land Management may make a § 3(e) determination, relying on the parties' agreement for the factual data, in the absence of final regulatory guidelines -- 423

ALASKA NATIVE CLAIMS SETTLEMENT ACT—Continued

DEFINITIONS—Continued

Public Lands

Department of the Interior Instructions 44 L.D. 513 (1916) Page

1. Construction and maintenance of an authorized Federal improvement on public lands under principles of Department of the Interior *Instructions*, 44 L.D. 359 (1915) and 44 L.D. 513 (1916), does not cause an appropriation of land affected and thus does not affect the right of selection by a Native corporation under the provisions of ANCSA--- 480
2. Inasmuch as the Federal interest in an improvement constructed and maintained on public land pursuant to *Instructions*, 44 L.D. 513 (1916), does not effect a segregation of, nor is it an interest in, the land itself, but is limited to the improvement, it cannot be considered as a possible exception to being "public land" within meaning of § 3(e)(1) of ANCSA-- 480
3. Where the record is uncontested and supports a factual finding that the United States no longer uses or needs an improvement pursuant to the principles of *Instructions*, 44 L.D. 513 (1916), the Board can accept a stipulation by the parties to remove the reservation of interest from a conveyance document-- 481

Withdrawal for National Defense Purposes

1. The phrase "national defense purposes" is not a term of art and does not have a precise legal meaning, but is a broadly inclusive descriptive term-- 123
2. Where neither the express language, nor the legislative history of ANCSA draws any distinction between withdrawals "for national defense purposes" and withdrawals for military reservations or other military uses, a withdrawal for use of the Department of the Army for terminal facilities in connection with a petroleum products pipeline system is considered to be a withdrawal "for national defense purposes" within the meaning of § 11(a)(1) of ANCSA---------------------- 123
3. In determining whether a national defense withdrawal, within the meaning of § 11(a)(1) of ANCSA, existed on Dec. 18, 1971, only the formal legal status of the withdrawal may be considered, and it is immaterial whether the purpose of the withdrawal has been fulfilled or whether the actual use to which the land is put has changed---------------- 123
4. ANCSA does not give the Secretary of the Interior the authority to make factual determinations as to the actual use of land which is withdrawn for national defense purposes, resulting in removal of such land from the protection of the exception for national defense purpose withdrawals in § 11(a)(1) of ANCSA-------------------------------- 124
5. Lands affected by construction and maintenance of a linear pipeline under principles of *Instructions*, 44 L.D. 513 (1916), are not "lands withdrawn or reserved for national defense purposes" within the meaning of the exception in § 11(a)(1) of ANCSA-------------------------- 480

NAVIGABLE WATERS

1. Where the Bureau of Land Management has redetermined that water bodies which are the subject of an appeal are navigable, and where the Board finds that the facts in the record upon which the Bureau of Land Management made its determination meet the essential elements of navigability, and where the facts in the record are undisputed so that no issue of fact as to navigability remains before the Board, then the Board will find the water bodies to be navigable---- 341

ALASKA NATIVE CLAIMS SETTLEMENT ACT—Continued

WITHDRAWALS AND RESERVATIONS

Withdrawals for Native Selection

State-Selected Lands Page

1. In the case of unlisted villages a period occurred, after enactment of the Alaska Native Claims Settlement Act and before the villages filed for eligibility, in which tentatively approved land selections of the State of Alaska were not yet withdrawn for potential village selections, and during this period the State could still create third-party interests in such lands 279
2. In the case of unlisted villages, third-party interests created by the State of Alaska on tentatively approved lands after enactment of the Alaska Native Claims Settlement Act are entitled to protection as valid existing rights provided such interests were created before the unlisted village applied for eligibility and lands were withdrawn for it 279

APPLICATIONS AND ENTRIES

GENERALLY

1. Having determined that the lands in question were withdrawn for national defense purposes during the selection period, BLM was required to reject appellant's selection application for such lands pursuant to regulations in 43 CFR 2091.1 124

VALID EXISTING RIGHTS

1. Where the holder of a coal prospecting permit completes his exploration and applies for a preference right coal lease in 1973, the application must be adjudicated on the basis of the applicant's subsequent conformity with regulations amended in 1976 with retroactive effect. However, where the application is summarily rejected solely for the reason that the applicant's supplemental submission is "inadequate," without identifying the deficiency, the decision will be vacated and the case remanded for readjudication 14

BOARD OF LAND APPEALS

1. As precedents, decisions of the Board of Land Appeals should be cited by the volume and page number given on the bottom of the page of the decision and not to the IBLA docket number shown on the top of the decision 110
2. Decisions of the Interior Board of Land Appeals are indexed, digested, and available for public inspection pursuant to published Departmental regulations. They meet the requirements of the Administrative Procedure Act and serve as binding Departmental precedents. However, adjudicative decisions by local Bureau of Land Management offices do not meet requirements of the Administrative Procedure Act and are not binding precedents 110

BUREAU OF INDIAN AFFAIRS

(*See also* Indian Probate—if included in this Index.)

ADMINISTRATIVE APPEALS

Acts of Agents of the United States

1. Where review is sought by action by BIA officials disbursing IIM account funds pursuant to agency regulation, their handling of the disbursements is reviewable by the IBIA under 25 CFR 2.3 501

BUREAU OF LAND MANAGEMENT

(*See also* Mineral Leasing Act—if included in this Index.)

1. Decisions of the Interior Board of Land Appeals are indexed, digested, and available for public inspection pursuant to published Depart-

BUREAU OF LAND MANAGEMENT—Continued Page

mental regulations. They meet the requirements of the Administrative Procedure Act and serve as binding Departmental precedents. However, adjudicative decisions by local Bureau of Land Management offices do not meet requirements of the Administrative Procedure Act and are not binding precedents 110

COAL LEASES AND PERMITS

(*See also* Mineral Leasing Act—if included in this Index.)

GENERALLY

1. Where the holder of a coal prospecting permit completes his exploration and applies for a preference right coal lease in 1973, the application must be adjudicated on the basis of the applicant's subsequent conformity with regulations amended in 1976 with retroactive effect. However, where the application is summarily rejected solely for the reason that the applicant's supplemental submission is "inadequate," without identifying the deficiency, the decision will be vacated and the case remanded for readjudication 14

LEASES

1. In determining whether a permittee is entitled to a preference right lease the Secretary must consider all legal and economic conditions affecting the proposed operation of the lease as of the time of the determination, including the applicable statutory minimum production royalty rate. A preference right lease must provide for a production royalty rate in conformity with the statutory minimum rate applicable at the time of issuance 69

ROYALTIES

1. The Federal Coal Leasing Amendments Act of 1975 left in effect the Secretary's authority under sec. 39 of the Mineral Leasing Act to reduce production royalties on coal leases below the statutory minimum rate 69
2. In determining whether a permittee is entitled to a preference right lease the Secretary must consider all legal and economic conditions affecting the proposed operation of the lease as of the time of the determination, including the applicable statutory minimum production royalty rate. A preference right lease must provide for a production royalty rate in conformity with the statutory minimum rate applicable at the time of issuance 69

COLOR OR CLAIM OF TITLE

ADVERSE POSSESSION

1. Prescriptive rights cannot be obtained against the Federal Government. Except as provided by the Color of Title Act, 45 Stat. 1069, *as amended*, 43 U.S.C. §1068–1068b (1976), no adverse possession of Government property can affect the title of the United States 82
2. The Color of Title Act requires that the claimant have held the subject tract of public land in good faith and in peaceful, adverse possession under claim or color of title for more than 20 years 82
3. Under the Color of Title Act, color or claim of title must be based upon a document from a source other than the United States which purports to convey to the applicant the land for which application is made. Possession and improvement of public land by a color of title applicant in the mistaken belief that he owns it is not sufficient basis for conveying title under the Color of Title Act 82

COLOR OR CLAIM OF TITLE—Continued

ADVERSE POSSESSION—Continued Page

4. Where appellants have not alleged facts bringing their claims within the Color of Title Act, they are not entitled to land under that statute ----- 83
5. Exclusive possession is required for the possession to be adverse -------- 83

GOOD FAITH

1. Good faith under the Color of Title Act requires that the claimant possess the land without knowing or having reason to know that title to the land was vested in the United States -------------------------------- 83

CONSTITUTIONAL LAW

GENERALLY

1. The Interior Board of Surface Mining and Reclamation Appeals is not the proper forum to consider the constitutionality of regulations promulgated by the Secretary --- 643

CONTESTS AND PROTESTS

(*See also* Administrative Procedure, Rules of Practice—if included in this Index.)

GENERALLY

1. The assertion that annual assessment work has not been performed is the assertion of a negative fact. If an examination of the mining claims and the nearby lands does not reveal the accomplishment of the required work, and there is no record of any such work having been performed, then evidence to this effect would be sufficient to establish a prima facie case. It would then devolve upon the claimant to show by a preponderance of the countervailing evidence that he has substantially complied with the statute -------------------------------- 248
2. In a Government contest proceeding to determine the validity of a mining claim, the claimant is always the proponent of the rule or order, always the one claiming to have earned the benefit of the mining laws through his compliance therewith. Regardless of whether the issue on which the validity of the claim rests is discovery, mode of location, or performance of assessment work, the relative position and obligation of the contestant and the contestee remain the same ---------------- 249
3. Where the Government contests the validity of a mining claim for nonperformance of annual assessment work, there is nothing inherent or implied in that action which requires a conclusion that the claim is valid in all other respects, nor may the bringing of such an action be treated as tantamount to an admission by the Government that "property rights in the claim have been established by the making of a valid location" --- 249

CONTRACTS

(*See also* Appeals, Claims Against the United States, Delegation of Authority, Labor, Rules of Practice—if included in this Index.)

CONSTRUCTION AND OPERATION

Generally

1. Where a cost-plus-fixed-free contractor has signed a contract amendment accepting the auditor's recommended overhead rates and no proof is offered to support claims for other disallowed costs, the Board finds there was a binding agreement on overhead rates and a failure to prove appellant's claims for other costs ------------------------------ 116

Actions of Parties

1. Where the scope of the work in the contract specifications included providing complete electrical service to the project and clearly indicated that

CONTRACTS—Continued

CONSTRUCTION AND OPERATION—Continued

Actions of Parties—Continued Page

in doing so the contractor must meet the requirements of the serving electric utility, the contractor assumed the risk of the cost of complying with those requirements when it failed to ascertain or inquire, before submitting its bid, what those costs might be 337

Allowable Costs

1. Where a contractor is found to have failed to maintain a system of cost records as required in the cost reimbursable contract, an affidavit of the contractor's project director prepared 5 years later is found to be insufficient evidence that unsupported retroactive cost transfers to the contract where costs actually incurred in performance of the contract 88
2. Where a cost-plus-fixed-fee contractor has signed a contract amendment accepting the auditor's recommended overhead rates and no proof is offered to support claims for other disallowed costs, the Board finds There was a binding agreement on overhead rates and a failure to prove appellant's claims for other costs 116
3. Where performance by a construction contractor was timely completed and no issue of liquidated damages is presented, an unforeseeable, area-wide cement shortage causing increased cost to the contractor will not entitle the contractor to a compensatory adjustment 180
4. Where, upon remand from the Court of Claims, the Board was directed to make a specific finding as to whether, if pipes rejected for small diameters or marked as special hydros had been available for use, the supply of acceptable pipe would have been sufficient to allow pipe laying operations to continue and the contractor merely alleged that its average production of pipe was greater than the average number of pipe it was required to furnish to its pipe laying subcontractor, the contractor's allegations obscured the fact that its own production and construction schedule called for specific sizes and lengths of pipe at specific times. The Board found that the contractor's total production was insufficient to maintain the contractor's own pipe laying schedule and therefore denied the contractor's claim for reimbursement of the payment it made to settle the delay claim of the subcontractor 230

Changed Conditions (Differing Site Conditions)

1. Where, under the standard Differing Site Conditions Clause of the contract, a construction contractor claims entitlement to increased costs caused by heavy rains or other adverse weather conditions, and the undisputed facts indicate no fault on the part of the Government, the contractor has failed to state or prove a claim upon which relief may be granted 56

Changes and Extras

1. Where the Government modified an invitation for bids by adding a note regarding grouting of equipment to two drawings but failed to change the drawings of circuit breakers to show placement of the grout and failed to change the specifications to require grouting of the circuit breakers, the Board held, under the rule of *contra proferentem* that the contractor's interpretation that the contract did not require grouting of the circuit breakers was reasonable and should prevail. The Government's direction to grout 17 of 21 Government-furnished circuit breakers was a change which entitled the contractor to an equitable adjustment 121

CONTRACTS—Continued
CONSTRUCTION AND OPERATION—Continued
Changes and Extras—Continued Page

2. The Board finds that constructive changes occurred: (1) when the Contracting Officer's representative directed the contractor to pour concrete into forms, slightly out of compliance, but approved by him with knowledge that some overruns might result; and (2) when the contract documents did not specify the requirement for construction of diversion works at certain sites, neither of the contracting parties being aware of the need for such construction until flooding by upstream activities of third parties, and the Contracting Officer's representative ordered the diversion works constructed which was necessary to complete the project, advised the contractor that it would be paid for the extra costs incurred, and notified the Contracting Officer by letter which enclosed a copy of the project plans with the diversion channels for the extra construction drawn in ---------------------- 180

3. Where an earlier decision of the Board upheld the Government's interpretation of internal diameter tolerances in the manufacture of concrete pipe but the Court of Claims held that the tolerances were too strict and remanded the appeal to the Board for reconsideration of the equitable adjustment to include the effects of erroneous rejections of pipe for small diameters, the Board found that the effects of the Government's actions were so intermingled with the effects of actions for which the contractor was responsible that no formula could be devised to make a precise apportionment of the causes of inefficiencies. In the absence of any sound basis for a precise determination, the Board utilized a jury verdict approach to allow the contractor an equitable adjustment for the effects of the Government's actions early in the production of concrete pipe ------------------------------ 230

Conflicting Clauses

1. Where the Government modified an invitation for bids by adding a note regarding grouting of equipment to two drawings but failed to change the drawings of circuit breakers to show placement of the grout and failed to change the specifications to require grouting of the circuit breakers, the Board held, under the rule of *contra proferentem* that the contractor's interpretation that the contract did not require grouting of the circuit breakers was reasonable and should prevail. The Government's direction to grout 17 of 21 Government-furnished circuit breakers was a change which entitled the contractor to an equitable adjustment -- 121

Construction Against Drafter

1. Where the Government modified an invitation for bids by adding a note regarding grouting of equipment to two drawings but failed to change the drawings of circuit breakers to show placement of the grout and failed to change the specifications to require grouting of the circuit breakers, the Board held, under the rule of *contra proferentem* that the contractor's interpretation that the contract did not require grouting of the circuit breakers was reasonable and should prevail. The Government's direction to grout 17 of 21 Government-furnished circuit breakers was a change which entitled the contractor to an equitable adjustment -- 121

CONTRACTS—Continued

CONSTRUCTION AND OPERATION—Continued

Contract Clauses Page

1. Where a contractor is found to have failed to maintain a system of cost records as required in the cost reimbursable contract, an affidavit of the contractor's project director prepared 5 years later is found to be insufficient evidence that unsupported retroactive cost transfers to the contract were costs actually incurred in performance of the contract ---------- 88

Duty to Inquire

1. Where the scope of the work in the contract specifications included providing complete electrical service to the project and clearly indicated that in doing so the contractor must meet the requirements of the serving electric utility, the contractor assumed the risk of the cost of complying with those requirements when it failed to ascertain or inquire, before submitting its bid, what those costs might be ---------- 337

General Rules of Construction

1. Where the contractor claimed interest for the cost of borrowing money to finance the Government caused increase in costs under a contract awarded before Government regulations required an interest clause, the Board followed the Court of Claims' rule laid down in *Dravo Corp.* v. *United States*, 594 F. 2d 842 (Ct. Cl. 1979), and denied the contractor's interest claim ---------- 231

Intent of Parties

1. Where the contracting officer responds to appellant's general inquiry on a number of pending claims, the Board finds that response is not a new appealable decision occurring after the effective date of the Contract Disputes Act of 1978 with regard to four appeals previously dismissed for lack of jurisdiction and then pending before the Board on appellant's motion for reconsideration ---------- 94

Subcontractors and Suppliers

1. Where a contractor claims excusable delays by reason of the failure of suppliers to timely supply material or to replace damaged or nonspecification material, the failure to show that the suppliers' delays were without the fault or negligence of both the contractor and the suppliers precludes a finding that the delays were excusable under the contract ---------- 154

CONTRACT DISPUTES ACT OF 1978

Jurisdiction

1. Where the contracting officer responds to appellant's general inquiry on a number of pending claims, the Board finds that response is not a new appealable decision occurring after the effective date of the Contract Disputes Act of 1978 with regard to four appeals previously dismissed for lack of jurisdiction and then pending before the Board on appellant's motion for reconsideration ---------- 94
2. Where a contractor does not elect to come under the Contract Disputes Act of 1978, except as contained in counsel's posthearing reply brief; the contract is awarded in Aug. of 1977; no claim is pending before the contracting officer on Mar. 1, 1979; and the contracting officer reviews claims already denied after a prehearing conference conducted in Aug. of 1979, in a final attempt to reach a settlement before hearing; the Board holds that, in such circumstances, no valid election to come under the Act has been made, and therefore the Board has no jurisdiction under the Act ---------- 450

CONTRACTS—Continued
DISPUTES AND REMEDIES
Burden of Proof Page
1. Where a cost-plus-fixed-fee contractor has signed a contract amendment accepting the auditor's recommended overhead rates and no proof is offered to support claims for other disallowed costs, the Board finds there was a binding agreement on overhead rates and a failure to prove appellant's claims for other costs 116
2. Where a contractor seeks relief from the assessment of liquidated damages for delayed completion of the contract work due to alleged excessive rain, the claim is denied for want of proof for failure to show that the amount of rain constituted unusually severe weather 154
3. In a case remanded to the Board by the Court of Claims in which the Board had previously found that 1,013 concrete pipes were wrongfully rejected and the Court of Claims afforded the contractor an opportunity to show by record evidence that more pipes were so rejected, but the contractor offered no probative evidence of additional wrongful rejections, the Board declined to increase the equitable adjustment allowed in its original decision 230
4. Where, upon remand from the Court of Claims, the Board was directed to make a specific finding as to whether, if pipes rejected for small diameters or marked as special hydros had been available for use, the supply of acceptable pipe would have been sufficient to allow pipe laying operations to continue and the contractor merely alleged that its average production of pipe was greater than the average number of pipe it was required to furnish to its pipe laying subcontractor, the contractor's allegations obscured the fact that its own production and construction schedule called for specific sizes and lengths of pipe at specific times. The Board found that the contractor's total production was insufficient to maintain the contractor's own pipe laying schedule and therefore denied the contractor's claim for reimbursement of the payment it made to settle the delay claim of the subcontractor 230

Damages
Liquidated Damages
1. Where a contractor claims excusable delays by reason of the failure of suppliers to timely supply material or to replace damaged or non-specification material, the failure to show that the suppliers' delays were without the fault or negligence of both the contractor and the suppliers precludes a finding that the delays were excusable under the contract 154
2. Where a contractor seeks relief from the assessment of liquidated damages for delayed completion of the contract work due to alleged excessive rain, the claim is denied for want of proof for failure to show that the amount of rain constituted unusually severe weather 154

Equitable Adjustments
1. Where, under the standard Differing Site Conditions Clause of the contract, a construction contractor claims entitlement to increased costs caused by heavy rains or other adverse weather conditions, and the undisputed facts indicate no fault on the part of the Government, the contractor has failed to state or prove a claim upon which relief may be granted 56

CONTRACTS—Continued

DISPUTES AND REMEDIES—Continued

Equitable Adjustments—Continued Page

2. Where the evidence of record is too general and inconclusive to permit a precise mathematical computation of quantum, but preponderates in favor of the contractor for entitlement to some allowance for unpaid excavation resulting from performance of a fixed price highway construction contract, the Board will determine the equitable adjustment by utilization of the jury verdict approach ____ 210
3. In the absence of a statute, procurement regulation, or specific contract provision permitting recovery from the Government for the costs of professional services not contributing directly to the performance of a fixed price type contract, such costs will not be allowed as part of an equitable adjustment, whether incurred before or after the findings of fact and decision of the contracting officer ____ 210
4. Where an earlier decision of the Board upheld the Government's interpretation of internal diameter tolerances in the manufacture of concrete pipe but the Court of Claims held that the tolerances were too strict and remanded the appeal to the Board for reconsideration of the equitable adjustment to include the effects of erroneous rejections of pipe for small diameters, the Board found that the effects of the Government's actions were so intermingled with the effects of actions for which the contractor was responsible that no formula could be devised to make a precise apportionment of the causes of inefficiencies. In the absence of any sound basis for a precise determination, the Board utilized a jury verdict approach to allow the contractor an equitable adjustment for the effects of the Government's actions early in the production of concrete pipe ____ 230

Jurisdiction

1. The Board has no jurisdiction to reform a contract which is not governed by the provisions of the Contract Disputes Act of 1978. Therefore, where the contract is not under that Act, and a construction contractor presents some evidence in support of a claim that the method of testing, employed by the Government to determine the compressive strength of structural concrete, is unfair, resulting in wrongful monetary penalties, but fails to allege or prove that the Government did not comply with the contract specifications in performing such testing, the Board will find such claim to be a request for reformation of the contract and will dismiss the claim for lack of jurisdiction ____ 180
2. Where the Board finds an indefinite quantity option-type contract to have been consummated by the parties, as opposed to a requirements-type contract, the contractor assumes the risk of whether the Government will order more than the minimum estimate of services anticipated to be ordered, and the Board, as a matter of law, is without jurisdiction to grant an equitable adjustment to the contractor under the changes clause, termination for convenience, or other contract clauses for claimed costs alleged to have resulted from the negligent preparation of maximum estimates ____ 450

Termination for Convenience

1. Where it is undisputed that the Government ordered the minimum amount of services required to be ordered under an indefinite quantity option

CONTRACTS—Continued

DISPUTES AND REMEDIES—Continued

Termination for Convenience—Continued Page

contract, and the Board finds that the failure of the contractor to timely perform delivery of the last seven call orders for services did not result from the low volume of work ordered by the Government, but instead, from reduction of typing staff, reduction of hours of typists employed to perform the contract, and failure to give priority to the contract work over other work, the contractor will be denied its request for a conversion of a termination for default to a termination for convenience of the Government ---------------------------------- 450

Termination for Default

Generally

1. Where a contract specifies the complement and standard for drilling equipment to be furnished, neither the preaward survey of appellant's equipment, nor the commencement of performance with incomplete and admittedly noncompliance equipment is deemed a waiver of the contract requirement, and a default termination after issuance of a "cure notice" is upheld upon the failure of the contractor to provide equipment as specified in the contract ---------------------------- 400
2. The contracting officer's decision to terminate for default a fixed price contract for the delivery of a single forked lift truck for a stated price is deemed proper where the appellant failed to timely deliver the truck to the specified delivery point by the specified contract delivery date -- 407

Excess Costs

1. Where the Government presented evidence of immediate need for replacement of a forked lift truck in need of repairs and presenting a safety hazard, the Government's action to reprocure the truck from the third lowest bidder who had the only immediately available truck complying with the contract standards is deemed proper and consistent with the duty to mitigate the reprocurement costs ---------------------- 407

PERFORMANCE OR DEFAULT

Excusable Delays

1. Where a contractor seeks relief from the assessment of liquidated damages for delayed completion of the contract work due to alleged excessive rain, the claim is denied for want of proof for failure to show that the amount of rain constituted unusually severe weather --------------- 155

CONVEYANCES

GENERALLY

1. Where evidence is persuasive that certain land was included in a homestead patent as the consequence of an error in description, and other land was settled, improved and occupied for several decades thereafter, an application to reform the patent will be allowed where the concerned administrative agencies do not object, the Government's interests are not unduly prejudiced, no third party's rights are affected, and substantial equities of the applicant will thereby be preserved --- 143

ENDANGERED SPECIES ACT OF 1973

GENERALLY

1. The Endangered Species Act of 1973, including the taking prohibitions of Sec. 9, applies to Native Americans exercising treaty hunting and fishing rights -- 525

EQUITABLE ADJUDICATION

Page

GENERALLY

1. No decision of any Federal court, or any formal decision or Instruction issued by the Department of the Interior has ever purported to hold that a mining claimant is not required under 30 U.S.C. § 28 (1976) to perform annual assessment work. Relevant court decisions deal not with the question whether oil shale claimants are required to comply with the provisions of sec. 28, but whether the United States is a beneficiary of a failure to perform the assessment work, and such decisions expressly note that a mining claimant is required to perform labor of $100 annually for each claim---------------------------- 249
2. The defense of laches is not available against the Government in cases involving public lands. Even were laches determined to be an available defense, it would clearly be circumscribed by the same limitations surrounding the doctrine of estoppel----------------------------- 249

ESTOPPEL

1. A party seeking to estop the Office of Surface Mining Reclamation and Enforcement from asserting that the party did not have a small operator exemption for a particular permit must clearly demonstrate its entitlement to the estoppel------------------------------- 138
2. No decision of any Federal court, or any formal decision or Instruction issued by the Department of the Interior has ever purported to hold that a mining claimant is not required under 30 U.S.C. § 28 (1976) to perform annual assessment work. Relevant court decisions deal not with the question whether oil shale claimants are required to comply with the provisions of sec. 28, but whether the United States is a beneficiary of a failure to perform the assessment work, and such decisions expressly note that a mining claimant is required to perform labor of $100 annually for each claim-------------------------- 249

EVIDENCE

GENERALLY

1. In determining the validity of a mining claim in a Government contest, the entire evidentiary record must be considered. If the Government fails to make a sufficient prima facie case against a mining claim, the claimant may move to have the contest dismissed and rest his case. However, when the claimant goes forward with his evidence, the Administrative Law Judge must consider the evidence presented and weigh it in accordance with its probative value. In choosing to rebut the case, the claimant bears the burden of doing so by a preponderance of the evidence and bears the risk of nonpersuasion if he fails------- 35

BURDEN OF PROOF

1. In determining the validity of a mining claim in a Government contest, the entire evidentiary record must be considered. If the Government fails to make a sufficient prima facie case against a mining claim, the claimant may move to have the contest dismissed and rest his case. However, when the claimant goes forward with his evidence, the Administrative Law Judge must consider the evidence presented and weigh it in accordance with its probative value. In choosing to rebut the case, the claimant bears the burden of doing so by a preponderance of the evidence and bears the risk of nonpersuasion if he fails------- 35
2. In a Government contest proceeding to determine the validity of a mining claim, the claimant is always the proponent of the rule or order, always

EVIDENCE—Continued **Page**

BURDEN OF PROOF—Continued

the one claiming to have earned the benefit of the mining laws through his compliance therewith. Regardless of whether the issue on which the validity of the claim rests is discovery, mode of location, or performance of assessment work, the relative position and obligation of the contestant and the contestee remain the same ---------------- 249

PREPONDERANCE

1. Where the Government contests mining claims on a charge of lack of discovery of a valuable mineral deposit prior to the date when such minerals were no longer subject to location, the claimant, as proponent of the rule, has the ultimate burden of proof as to validity of the claim. The Government, however, must initially present sufficient evidence to establish a prima facie case. The burden then shifts to the claimant to show by a preponderance of credible evidence that a discovery has been made on each claim ---------------------------------- 35

PRIMA FACIE CASE

1. Where the Government contests mining claims on a charge of lack of discovery of a valuable mineral deposit prior to the date when such minerals were no longer subject to location, the claimant, as proponent of the rule, has the ultimate burden of proof as to validity of the claim. The Government, however, must initially present sufficient evidence to establish a prima facie case. The burden then shifts to the claimant to show by a preponderance of credible evidence that a discovery has been made on each claim ---------------------------------- 35
2. The assertion that annual assessment work has not been performed is the assertion of a negative fact. If an examination of the mining claims and the nearby lands does not reveal the accomplishment of the required work, and there is no record of any such work having been performed, then evidence to this effect would be sufficient to establish a prima facie case. It would then devolve upon the claimant to show by a preponderance of the countervailing evidence that he has substantially complied with the statute ---------------------------------- 249

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976

(*See also* Hearings—if included in this Index.)

CONVEYANCES

1. Where evidence is persuasive that certain land was included in a homestead patent as the consequence of an error in description, and other land was settled, improved and occupied for several decades thereafter, an application to reform the patent will be allowed where the concerned administrative agencies do not object, the Government's interests are not unduly prejudiced, no third party's rights are affected, and substantial equities of the applicant will thereby be preserved ---- 143

RIGHTS-OF-WAY

1. Public Land Order No. 2676 (1962), requires the approval of an authorized officer of the Department of the Army before the Secretary of the Interior can grant a right-of-way over lands subject to the public land order. The Department of the Interior has no authority to grant a right-of-way where the approval is withheld -------------------- 21
2. All facilities related to an oil and gas lease which are located on Federal land outside the lease, regardless of their nature, may be constructed only after appropriate rights-of-way have been granted. Similarly, on-lease oil and gas transportation facilities and on-lease commercial facilities require rights-of-way. Depending on the nature of the facil-

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976—Continued

Page

RIGHTS-OF-WAY—Continued

ity, the right-of-way would be granted pursuant to either sec. 28 of the Mineral Leasing Act of 1920, 30 U.S.C. § 185 (1976), or Title V of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1761–1771 (1976) 291

3. The Federal Land Policy and Management Act of 1976 authorizes the Bureau of Land Management to recover reasonable costs including costs of environmental analyses for applications of rights-of-way across public lands 473

4. Costs not directly associated with the processing or monitoring of a right-of-way application, such as evaluation of the mine to be served by the rights-of-way, are not authorized by the Federal Land Policy and Management Act of 1976 and are not reimbursable pursuant to 43 CFR 2802.1–2 473

RULES AND REGULATIONS

1. An assertion of a preference right to purchase public land offered for public sale pursuant to the Unintentional Trespass Act of Sept. 26, 1968, 82 Stat. 870 (43 U.S.C. §§ 1431–1435 (1976)) (now covered by the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701, 1722 (1976)), is improperly rejected when the applicant submits satisfactory equitable proof of his "ownership" of contiguous lands by showing that he has contracted to purchase such land, has made at least partial payment therefor, and is in possession thereof 350

SALES

1. An assertion of a preference right to purchase public land offered for public sale pursuant to the Unintentional Trespass Act of Sept. 26, 1968, 82 Stat. 870 (43 U.S.C. §§ 1431–1435 (1976)) (now covered by the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701, 1722 (1976)), is improperly rejected when the applicant submits satisfactory equitable proof of his "ownership" of contiguous lands by showing that he has contracted to purchase such land, has made at least partial payment therefor, and is in possession thereof 350

WITHDRAWALS

1. A mining claim located on land temporarily segregated from appropriation under the mining laws pursuant to 43 U.S.C. § 1714(b) (1976) is null and void ab initio 462

2. Under 43 U.S.C. § 1714(b) (1976) a publication in the *Federal Register* of notification of an application for withdrawal, which publication temporarily segregates land from the operation of the mining laws, does not withdraw the land, and therefore the notice need not be signed by the Secretary or an individual in the Office of the Secretary who has been appointed by the President, by and with the advice and consent of the Senate 462

HEARINGS

(*See also* Administrative Procedure, Federal Land Policy & Management Act of 1976, Geothermal Leases, Grazing Permit & Licenses, Indian Probate, Mining Claims, Multiple Mineral Development Act, Rules of Practice, Surface Resource Act, Water Pollution Control—if included in this Index.)

1. Where a corporate simultaneous oil and gas lease offeror alleges no facts which could disprove its failure to comply with 43 CFR 3102.4–1, no hearing will be granted as requested 110

INDIAN LANDS

(*See also* Exchanges of Land, Indian Probate, Rights-of-Way—if included in this Index.)

ALLOTMENTS Page

Alienation

1. An Indian tribe, seeking to enforce debt collection of loan secured by mortgage of trust lands and assignment of income from trust lands executed more than 1 year prior to bankruptcy, presented an assignment of trust income executed in conformity with 25 CFR 109.4 to BIA officials responsible for administration of appellant's IIM account. The security interest thus obtained in appellant's trust lands by the tribe is a perfected security interest which attaches to the fund and entitles the tribe to the payments made by the agency officials despite appellant's intervening adjudication of bankruptcy ---------------- 501
2. In light of the unique history of land ownership and Federal-Indian relations on the Quinault Reservation, any Quinault allottee living on June 1, 1934, should be entitled to receive other trust land on the reservation by gift deed in accordance with the provisions of secs. 5 and 19 of the Indian Reorganization Act (25 U.S.C. §§ 465 and 479 (1976)) --------- 508

ASSIGNMENTS

1. An Indian tribe, seeking to enforce debt collection of loan secured by mortgage of trust lands and assignment of income from trust lands executed more than 1 year prior to bankruptcy, presented an assignment of trust income executed in conformity with 25 CFR 109.4 to BIA officials responsible for administration of appellant's IIM account. The security interest thus obtained in appellant's trust lands by the tribe is a perfected security interest which attaches to the fund and entitles the appellant's tribe to the payments made by the agency officials despite appellant's intervening adjudication of bankruptcy ---------------------------- 501

GRAZING

Generally

1. The Bureau's decision to increase grazing fees for the fourth year of the permit period is not inconsistent with the general regulatory provisions of 25 CFR Part 151, which are incorporated by reference in the permit - 201
2. The plain wording of the grazing permit does not convey the stipulation that new fees may be pronounced by Aug. 1, 1979, but not thereafter. As there is no legal requirement that permittees be given prior notice of grazing fee increases, it is not unreasonable to conclude that the Aug. 1 date cited in the permit refers merely to a goal or objective for the completion of fee reevaluations --------------------------------- 201
3. The appellant association and members thereof have not been denied *substantive* due process through the readjustment of a grazing permit which specifically provides for readjustment. Appellant's *procedural* due process rights are secured through the opportunity to appeal the Area Director's action to the Commissioner and the Board of Indian Appeals pursuant to the provisions of 25 CFR Part 2 and 43 CFR 4.350–4.369 -- 202

Appeals

1. The appellant association and members thereof have not been denied *substantive* due process through the readjustment of a grazing permit which specifically provides for readjustment. Appellant's *procedural* due process rights are secured through the opportunity to appeal the Area Director's action to the Commissioner and the Board of Indian Appeals pursuant to the provisions of 25 CFR Part 2 and 43 CFR 4.350–4.369 -- 202

INDIAN LANDS—Continued

GRAZING—Continued

Rental Rates Page

1. The Bureau's decision to increase grazing fees for the fourth year of the permit period is not inconsistent with the general regulatory provisions of 25 CFR Part 151, which are incorporated by reference in the permit 201
2. The plain wording of the grazing permit does not convey the stipulation that new fees may be pronounced by Aug. 1, 1979, but not thereafter. As there is no legal requirement that permittees be given prior notice of grazing fee increases, it is not unreasonable to conclude that the Aug. 1 date cited in the permit refers merely to a goal or objective for the completion of fee reevaluations 201
3. The appellant association and members thereof have not been denied *substantive* due process through the readjustment of a grazing permit which specifically provides for readjustment. Appellant's *procedural* due process right are secured through the opportunity to appeal the Area Director's action to the Commissioner and the Board of Indian Appeals pursuant to the provisions of 25 CFR Part 2 and 43 CFR 4.350–4.369 202

LEASES AND PERMITS

Long-term Business/Agriculture

Cancellation

1. Where a business lease between tribe and automobile dealer contains a cancellation clause providing for alternative remedies in case of breach of the agreement by lessee, use of the phrase "and/or" in reference to the various alternatives cannot reasonably be construed to be a delegation to the tribe of Secretarial authority to cancel the lease in the event of breach of the lease by the lessee. Nor does the existence of alternative remedies in the lease constitute Secretarial consent that the tribe undertake to administer the lease without agency participation contrary to Departmental regulations 189
2. Where Departmental regulations at 25 CFR Part 131 are incorporated by reference as part of the lease, those regulations are to be applied in the administration of the lease as though fully set out in the written lease agreement. The regulations incorporated into the lease become binding upon the parties. The agency may not ignore nor act contrary to the provisions of the incorporated regulations which require Secretarial consent to cancellation of the lease, subject to certain specified due process requirements set out in the regulations 189
3. A collateral attempt by a tribal court to cancel appellant's lease by entry of a declaratory judgment that appellant "materially breached the lease" is ineffective to result in cancellation since the judgment goes beyond the subject matter jurisdiction of the court to enforce 189

INDIAN PROBATE

(*See also* Appeals, Bureau of Indian Affairs, Hearings, Indian Lands, Indian Tribes, Rules of Practice—if included in this Index.)

ADOPTION

Generally

1. One who participated in an adoption proceeding has no standing to object that some other person was deprived of his or her constitutional rights 311
2. Where the jurisdictional invalidity of an Indian adoption granted by an officer of the Bureau of Indian Affairs appears on the face of the record, the judgment is open to attack, direct or collateral, at any time 311

INDIAN PROBATE—Continued

ADOPTION—Continued

Generally—Continued Page

3. The Supreme Court's ruling in *Fisher* v. *District Court of the Sixteenth Judicial District of Montana*, 424 U.S. 382 (1976), makes it clear that 25 U.S.C. § 372a (1976) is not a statute which bestows authority to grant adoptions. The Act of July 8, 1940, simply provides that the Secretary of the Interior may rely on adoptions legally consummated under other specific authority in the course of performing the probate functions conferred on him by Congress 311

CHILDREN, ILLEGITIMATE

Generally

1. The Administrative Law Judge held a full and complete hearing on the issue of decedent's possible paternity of Stephanie Young Bear and his finding that she was conceived by decedent through criminal intercourse with his purported daughter by adoption was supported by a preponderance of the evidence 312

CLAIM AGAINST ESTATE

Generally

1. The Board is not limited in its scope of review of an Administrative Law Judge's disposition of claims and may exercise the inherent authority of the Secretary to correct a manifest injustice or clear error where appropriate 99
2. The amount of a claim which must be paid from trust assets is as crucial a decision as whether such claim should be paid at all. It would therefore be improper for the Administrative Law Judge to allow the agency superintendent to determine the amount of an approved claim which must be paid a general creditor based on future documentation of the creditor's exhaustion of an Indian decedent's non-trust assets 99

Proof of Claim

1. It would defeat the intent of Congress, which has formulated strict rules for the Secretary to follow in the management of trust property, for claims arising from alleged agreements affecting trust realty to be allowed on the basis of mere parol evidence. The potential for fraud would otherwise be too great 99

Source of Funds for Payment

1. While the Department's regulations do not explicitly recite that trust assets may be utilized for the payment of general creditors' claims only after all other sources of compensation have been exhausted, this limitation is implicit in both the Department's regulatory plan for the payment of claims and in the nature of the trust relationship between the Secretary and Indian heirs of allotted lands. Any trustee, let alone the Secretary, would be derelict who generally commits trust funds to pay debts legally compensable from other sources 99

Timely Filing

Generally

1. In accordance with 43 CFR 4.250, all claims against the estate of a deceased Indian held by creditors chargeable with notice of the hearing under 43 CFR 4.211(c) shall be filed prior to the conclusion of the first probate hearing and if they are not so filed, they shall be forever barred 99

ESCHEAT

1. The Act of Nov. 24, 1942, 56 Stat. 1022 (25 U.S.C. § 373b (1976)) is not ambiguous. It plainly states that where, as here, a public domain

INDIAN PROBATE—Continued

ESCHEAT—Continued Pa

allotment exceeding a value of $2,000 lies adjacent to an Indian community and may be advantageously used for Indian purposes, such allotment shall be held in trust by the United States for such Indians as Congress (not the Secretary of the Interior) may designate, where the owner of the allotment dies intestate without heirs eligible to inherit such allotment 60

EVIDENCE

Generally

1. The Administrative Law Judge held a full and complete hearing on the issue of decedent's possible paternity of Stephanie Young Bear and his finding that she was conceived by decedent through criminal intercourse with his purported daughter by adoption was supported by a preponderance of the evidence 31

HEARING

Full and Complete

1. The Administrative Law Judge held a full and complete hearing on the issue of decedent's possible paternity of Stephanie Young Bear and his finding that she was conceived by decedent through criminal intercourse with his purported daughter by adoption was supported by a preponderance of the evidence 31

WILLS

Testamentary Capacity

Witnesses' Testimony

1. Where the agency clerk to whom decedent dictated her will had known the decedent and her family since the clerk was 10 years old, and the clerk's testimony established that the testatrix knew the nature and extent of her property, remembered and discussed the personal situations of each of her children, and had made a testamentary plan by which she wished to distribute her property, the fact that one of her children benefited more than any of the others did not tend to show the decedent lacked testamentary capacity, nor was the testamentary plan unreasonable 6

2. Where the witnesses to an Indian will were nurses at the hospital where decedent spent her last illness and testified that they had observed her conduct as a patient and her behavior with her family and felt her to be competent and able to understand what she was doing when she made a will, the reluctance of decedent's attending physician to commit himself to an opinion concerning the ability of decedent to understand "legal documents" did not tend to contradict the nurses' testimony that decedent was competent to make a will, nor did it indicate that decedent lacked testamentary capacity 6

INDIAN REORGANIZATION ACT

1. In light of the unique history of land ownership and Federal-Indian relations on the Quinault Reservation, any Quinault allottee living on June 1, 1934, should be entitled to receive other trust land on the reservation by gift deed in accordance with the provisions of secs. 5 and 19 of the Indian Reorganization Act (25 U.S.C. §§ 465 and 479 (1976)) 50

INDIAN TRIBES

(*See also* Appeals, Indian Probate—if included in this Index.)

MEMBERSHIP

1. It is for the Indian tribe, not this Department, to determine composition of the tribe. In 1922 the Quinault Tribe did not recognize as members

INDIAN TRIBES—Continued

MEMBERSHIP—Continued Page

thereof any Indian of the reservation, but affiliate memberships were authorized for persons of one-quarter Quileute, Hoh, Chehalis, Chinook, or Cowlitz blood, under specified conditions 508

INDIANS

CIVIL RIGHTS

1. A complaint that transfer of funds from an IIM account violates due process provisions of the Indian Civil Rights Act, 25 U.S.C. § 1302 (1976), lies outside the review authority of the Department of the Interior 501

HUNTING AND FISHING

1. Indian hunting and fishing rights, created by treaty or otherwise, do not include the right to take species which have been listed as threatened or endangered pursuant to the Endangered Species Act of 1973 525

INDIAN CIVIL RIGHTS ACT OF 1968

1. A complaint that transfer of funds from an IIM account violates due process provisions of the Indian Civil Rights Act, 25 U.S.C. § 1302 (1976), lies outside the review authority of the Department of the Interior 501

INTERVENTION

1. Intervention in proceedings before the Alaska Native Claims Appeal Board is in the discretion of the Board. 43 CFR 4.909(b) 164
2. The Board will not allow intervention following resolution of the issues on appeal 164

LACHES

1. The defense of laches is not available against the Government in cases involving public lands. Even were laches determined to be an available defense, it would clearly be circumscribed by the same limitations surrounding the doctrine of estoppel 249

MINERAL LANDS

DETERMINATION OF CHARACTER OF

1. A single discovery of mineral within a placer mining claim does not conclusively establish the mineral character of all the land included in the location. Whether the land embraced in the claim is mineral in character is an issue which remains open to investigation and determination by the Department until patent issues. The contestee must establish that each 10-acre tract within the entire claim is mineral in character, failing in which any nonmineral 10-acre tract is properly excluded from the patent application 536

MINERAL LEASING ACT

(*See also* Bureau of Land Management, Coal Leases & Permits, Geothermal Leases, Oil & Gas Leases, Phosphate Leases & Permits, Potassium Leases & Permits, Sodium Leases & Permits—if included in this Index.)

GENERALLY

1. The initial terms of any new competitive mineral lease must conform to the statutory minimum production royalty rate then applicable to that type of mineral lease. Competitive and noncompetitive mineral leases for coal, phosphate, potassium, sodium, and oil shale are subject to periodic readjustment of their terms and conditions. Such readjustments must conform to the statutory minimum production royalty rates then applicable 69

MINERAL LEASING ACT—Continued

GENERALLY—Continued Page

2. The lease readjustment process and the sec. 39 royalty reduction process may not be merged into a single process where this would result in a readjusted production royalty rate below the applicable statutory minimum. The sec. 39 determination must be made independently --- 69
3. In determining whether a permittee is entitled to a preference right lease the Secretary must consider all legal and economic conditions affecting the proposed operation of the lease as of the time of the determination, including the applicable statutory minimum production royalty rate. A preference right lease must provide for a production royalty rate in conformity with the statutory minimum rate applicable at the time of issuance --- 69
4. Failure to maintain a claim by doing assessment work each year may constitute evidence of abandonment. Independently, a failure to substantially comply with the requirement that annual assessment work be performed, 30 U.S.C. § 28 (1976), requires a finding that the claim has not been "maintained" within the meaning of sec. 37 of the Mineral Leasing Act, 30 U.S.C. § 193 (1976), and may result in a forfeiture of the claim. *Hickel* v. *The Oil Shale Corp.*, 400 U.S. 48 (1970) --- 249
5. Sec. 28 of the Mineral Leasing Act of 1920, 30 U.S.C. § 185 (1976), is not applicable to on-lease oil and gas production facilities which are included in a surface use and operations plan, and which are authorized by the approval of an application to conduct leasehold operations or construction activities --- 291
6. Sec. 29 of the Mineral Leasing Act of 1920, 30 U.S.C. § 186 (1976), has consistently been interpreted as not providing authority separate from sec. 28 of the Mineral Leasing Act, 30 U.S.C. § 185 (1976), for oil and gas pipeline rights-of-way. Instead, it reserves to the United States the right to allow other rights-of-way or to lease other minerals on Federal land already leased for the extraction of one mineral, and allows the reservation of the right to dispose of the surface of land leased for mineral extraction "insofar as said surface is not necessary to the use of the lessee in extracting and removing deposits thereon." - 291
7. The Secretary has broad power to regulate all on-lease activities by oil and gas lessees and operators pursuant to the conditions contained in oil and gas leases and his general regulatory authority under the Mineral Leasing Act. The procedures for regulating activities on oil and gas leases, established under Secretarial Order 2948 and the BLM–USGS Cooperative Procedures Agreement implementing that order, reserve to the Department the authority to protect the United States legal interests in the property. The Secretary has broad discretion either to continue this procedure, or to substitute any other delegation of his authority and any other reasonable regulatory procedure which he concludes would equally protect the United States interests --- 291
8. All facilities related to an oil and gas lease which are located on Federal land outside the lease, regardless of their nature, may be constructed only after appropriate rights-of-way have been granted. Similarly, on-lease oil and gas transportation facilities and on-lease commercial facilities require rights-of-way. Depending on the nature of the facility, the right-of-way would be granted pursuant to either sec. 28 of the Mineral Leasing Act of 1920, 30 U.S.C. § 185 (1976), or Title V of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1761–1771 (1976) --- 291

MINERAL LEASING ACT—Continued

ROYALTIES Page

1. Sec. 39 of the Mineral Leasing Act authorizes the Secretary to reduce the royalty on coal, oil and gas, oil shale, phosphate, sodium, potassium, and sulphur leases in the interest of conservation whenever in his judgment it is necessary to do so in order to promote development, or whenever in his judgment the leases cannot be successfully operated under the terms provided therein ---------- 69
2. Sec. 39 of the Mineral Leasing Act authorizes the Secretary to reduce production royalties on coal, oil and gas, phosphate, sodium, potassium, and sulphur leases below the statutory minimum rates established for those minerals ---------- 69
3. The Federal Coal Leasing Amendments Act of 1975 left in effect the Secretary's authority under sec. 39 of the Mineral Leasing Act to reduce production royalties on coal leases below the statutory minimum rate ---------- 69
4. The initial terms of any new competitive mineral lease must conform to the statutory minimum production royalty rate then applicable to that type of mineral lease. Competitive and noncompetitive mineral leases for coal, phosphate, potassium, sodium and oil shale are subject to periodic readjustment of their terms and conditions. Such readjustments must conform to the statutory minimum production royalty rates then applicable ---------- 69
5. The lease readjustment process and the sec. 39 royalty reduction process may not be merged into a single process where this would result in a readjusted production royalty rate below the applicable statutory minimum. The sec. 39 determination must be made independently --- 69
6. The Crude Oil Windfall Profit Tax, P.L. 96–223, 94 Stat. 229 (1980) imposes the windfall profit tax on Federal oil royalty revenue. The States have no economic interest, as the phrase is used in the Windfall Profit Tax Act, in Federal royalty revenue that would exempt their share from taxation. Moreover, revenue from the windfall profit tax cannot be treated as royalty revenue and be distributed to the states under sec. 35 of the Mineral Leasing Act, *as amended*, 30 U.S.C. § 191 (1976). Accordingly, the states' share of Federal oil royalties must be based upon after-tax royalty revenue ---------- 661

MINING CLAIMS

(*See also* Hearings, Millsites, Multiple Mineral Development Act, Surface Resources Act—if included in this Index.)

GENERALLY

1. In order to obtain a temporary deferment, a claimant must file with the authorized officer of the proper office a petition in duplicate requesting such deferment. The applicant must attach to one copy thereof a copy of the notice to the public required by the Act which shows that it has been filed or recorded in the office in which the notices or certificates of location were filed or recorded ---------- 395
2. A petition for deferment of annual assessment work is properly denied where a claimant's mining claims and millsites have been declared null and void by the Department ---------- 395
3. Under *Andrus* v. *Shell Oil Co.*, —— U.S. ——, 64 L. Ed. 2d 593 (1980), 48 U.S.L.W. 4603 (June 2, 1980), oil shale is a prospectively valuable mineral and therefore present marketability need not be shown to demonstrate discovery ---------- 535

MINING CLAIMS—Continued

GENERALLY—Continued Pag

4. To demonstrate a sufficient discovery of oil shale under *Freeman* v. *Summers*, 52 L.D. 201 (1927), a mining claimant must show that mineral was disclosed on or before Feb. 25, 1920, in such situation and such formation that he can follow the deposit to depth with reasonable assurance that paying minerals will be found. An isolated bit of mineral, not connected with or leading to substantial prospective values, is not a sufficient discovery -- 536

ABANDONMENT

1. Failure to maintain a claim by doing assessment work each year may constitute evidence of abandonment. Independently, a failure to substantially comply with the requirement that annual assessment work be performed, 30 U.S.C. § 28 (1976), requires a finding that the claim has not been "maintained" within the meaning of sec. 37 of the Mineral Leasing Act, 30 U.S.C. § 193 (1976), and may result in a forfeiture of the claim. *Hickel* v. *The Oil Shale Corp.*, 400 U.S. 48 (1970) --- 249

ASSESSMENT WORK

1. Where the Government contests the validity of a mining claim for nonperformance of annual assessment work, there is nothing inherent or implied in that action which requires a conclusion that the claim is valid in all other respects, nor may the bringing of such an action be treated as tantamount to an admission by the Government that "property rights in the claim have been established by the making of a valid location." -- 249
2. Failure to maintain a claim by doing assessment work each year may constitute evidence of abandonment. Independently, a failure to substantially comply with the requirement that annual assessment work be performed, 30 U.S.C. § 28 (1976), requires a finding that the claim has not been "maintained" within the meaning of sec. 37 of the Mineral Leasing Act, 30 U.S.C. § 193 (1976), and may result in a forfeiture of the claim. *Hickel* v. *The Oil Shale Corp.*, 400 U.S. 48 (1970) --- 249
3. In order to obtain a temporary deferment, a claimant must file with the authorized officer of the proper office a petition in duplicate requesting such deferment. The applicant must attach to one copy thereof a copy of the notice to the public required by the Act which shows that it has been filed or recorded in the office in which the notices or certificates of location were filed or recorded -- 395
4. A petition for deferment of annual assessment work is properly denied where a claimant's mining claims and millsites have been declared null and void by the Department -- 395

COMMON VARIETIES OF MINERALS

Generally

1. Sec. 3 of the Surface Resources Act of July 23, 1955, 69 Stat. 367, 368, 30 U.S.C. § 611 (1976), declared that common varieties of sand and gravel are not valuable mineral deposits under the mining laws. In order for a claim for such material to be sustained as validated by a discovery, the prudent man-marketability test of discovery of a valuable mineral deposit must have been met at the date of the Act, and reasonably continuously thereafter -- 386

CONTESTS

1. A Forest Service special use permit issued to a state agency does not constitute a withdrawal of the land involved from appropriation under the mining law, and a contest will not lie against a subsequently located mining claim on a charge that a portion of the claim is void to the extent that it includes land embraced by the permit ---------------- 34

MINING CLAIMS—Continued

CONTESTS—Continued Page

2. Where the Government contests mining claims on a charge of lack of discovery of a valuable mineral deposit prior to the date when such minerals were no longer subject to location, the claimant, as proponent of the rule, has the ultimate burden of proof as to validity of the claim. The Government, however, must initially present sufficient evidence to establish a prima facie case. The burden then shifts to the claimant to show by a preponderance of credible evidence that a discovery has been made on each claim 35
3. In determining the validity of a mining claim in a Government contest, the entire evidentiary record must be considered. If the Government fails to make a sufficient prima facie case against a mining claim, the claimant may move to have the contest dismissed and rest his case. However, when the claimant goes forward with his evidence, the Administrative Law Judge must consider the evidence presented and weigh it in accordance with its probative value. In choosing to rebut the case, the claimant bears the burden of doing so by a preponderance of the evidence and bears the risk of nonpersuasion if he fails 35
4. In a mining contest, a matter not charged in the complaint cannot be used as a ground to invalidate a claim, unless it has been raised at the hearing and the contestee has not objected 36
5. The assertion that annual assessment work has not been performed is the assertion of a negative fact. If an examination of the mining claims and the neaby lands does not reveal the accomplishment of the required work, and there is no record of any such work having been performed, then evidence to this effect would be sufficient to establish a prima facie case. It would then devolve upon the claimant to show by a preponderance of the countervailing evidence that he has substantially complied with the statute 249
6. In a Government contest proceeding to determine the validity of a mining claim, the claimant is always the proponent of the rule or order, always the one claiming to have earned the benefit of the mining laws through his compliance therewith. Regardless of whether the issue on which the validity of the claim rests is discovery, mode of location, or performance of assessment work, the relative position and obligation of the contestant and the contestee remain the same 249
7. Where the Government contests the validity of a mining claim for nonperformance of annual assessment work, there is nothing inherent or implied in that action which requires a conclusion that the claim is valid in all other respects, nor may the bringing of such an action be treated as tantamount to an admission by the Government that "property rights in the claim have been established by the making of a valid location." 249
8. When the Government contests a mining claim on a charge of lack of discovery of a valuable mineral deposit, it has assumed the burden of going forward with sufficient evidence to establish a prima facie case. Where a Government mineral examiner testifies that he has examined a claim and found the quantity of minerals insufficient to support a finding of discovery, a prima facie case of invalidity has been established and the burden shifts to the claimants to show by a preponderance of the evidence that a discovery has been made 386

MINING CLAIMS—Continued

CONTESTS—Continued

9. Where there is not sufficient reason shown to disturb an Administrative Law Judge's finding that the prudent man-marketability test was met as of July 23, 1955, and continuously thereafter by mining claimants who extracted and profitably sold sand and gravel from the claims prior to that date and continuously thereafter, the decision will be sustained on appeal--

10. The Board of Land Appeals will not order a further hearing in a mining claim contest case where a patent application has been filed merely because the evidentiary record is inadequate to invalidate the claims for lack of a discovery of a valuable mineral deposit, if the claimant is found to have met the discovery test-----------------------------

11. When the United States contests a mining claim it has by practice assumed only the burden of going forward with sufficient evidence to establish a prima facie case on the charges in the contest complaint; the burden then shifts to the contestee to refute, by a preponderance of the evidence, the Government's case---

12. The United States has established a prima facie case of the invalidity of a mining claim when a qualified Government maining examiner testifies that he has examined the claim and found the mineral values insufficient to support the discovery of a valuable deposit--------------------

DETERMINATION OF VALIDITY

1. When land is withdrawn from location under the mining laws subsequent to the location of a mining claim, the claim must be supported by discovery at the date of withdrawal to be valid-------------------

2. If a mining claimant locates a group of claims, he must establish discovery for each claim that he seeks to validate--------------------------

3. Where the Government contests mining claims on a charge of lack of discovery of a valuable mineral deposit prior to the date when such minerals were no longer subject to location, the claimant, as proponent of the rule, has the ultimate burden of proof as to validity of the claim. The Government, however, must initially present sufficient evidence to establish a prima facie case. The burden then shifts to the claimant to show by a preponderance of credible evidence that a discovery has been made on each claim--------------------------

4. Land is mineral in character when known conditions engender the belief that the land contains mineral of such quantity and quality as to render its extraction profitable and justify expenditures to that end. The charge that the lands embraced by a mining claim are not mineral in character can raise two discrete issues. First, it can challenge the validity of the entire claim. Alternatively, it can be applied to placer claims which are supported by a discovery, with the effect that the claimant must show that each 10 acres of the claim are mineral in character--

5. The charge of invalidity due to the presence of excess reserves admits that the mineral, *qua* mineral, exists within additional claims, but raises the contention that because of the quantity of mineral present in unchallenged claims owned by the mineral claimant, the mineral in the challenged claims would have no market and thus is essentially valueless--

6. A valid mining claim for lands previously withdrawn from location must be supported by discovery as of the date of withdrawal and a showing that marketability has continued since discovery and the minerals can presently be profitably extracted---------------------------

MINING CLAIMS—Continued

DETERMINATION OF VALIDITY—Continued Page

7. In a Government contest proceeding to determine the validity of a mining claim, the claimant is always the proponent of the rule or order, always the one claiming to have earned the benefit of the mining laws through his compliance therewith. Regardless of whether the issue on which the validity of the claim rests is discovery, mode of location, or performance of assessment work, the relative position and obligation of the contestant and the contestee remain the same 249
8. Where the Government contests the validity of a mining claim for nonperformance of annual assessment work, there is nothing inherent or implied in that action which requires a conclusion that the claim is valid in all other respects, nor may the bringing of such an action be treated as tantamount to an admission by the Government that "property rights in the claim have been established by the making of a valid location." 249
9. Sec. 3 of the Surface Resources Act of July 23, 1955, 69 Stat. 367, 368, 30 U.S.C. § 611 (1976), declared that common varieties of sand and gravel are not valuable mineral deposits under the mining laws. In order for a claim for such material to be sustanied as validated by a discovery, the prudent man-marketability test of discovery of a valuable mineral deposit must have been met at the date of the Act, and reasonably continuously thereafter 386
10. The prudent man test of discovery has been satisfied where minerals have been found in sufficient quantity and of sufficient quality that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. The marketability refinement of the prudent man test of discovery requires that the mineral locator must show that by reason of accessibility, bona fides in development, proximity to market, existence of present demand, and other factors, the mineral deposit is of such value that it can be mined, removed and disposed of at a profit 386
11. Under *Andrus* v. *Shell Oil Co.*, ——— U.S. ———, 64 L.Ed.2d 593 (1980), 48 U.S.L.W. 4603 (June 2, 1980), oil shale is a prospectively valuable mineral and therefore present marketability need not be shown to demonstrate discovery 535
12. To demonstrate a sufficient discovery of oil shale under *Freeman* v. *Summers*, 52 L.D. 201 (1927), a mining claimant must show that mineral was disclosed on or before Feb. 25, 1920, in such situation and such formation that he can follow the deposit to depth with reasonable assurance that paying minerals will be found. An isolated bit of mineral, not connected with or leading to substantial prospective values, is not a sufficient discovery 536
13. Under *Freeman* v. *Summers*, an exposure of the Parachute Creek member, even though of limited extent, can be geologically inferred to embrace sufficient quantity of high grade oil shale so as to constitute a valuable mineral deposit 536
14. When the United States contests a mining claim it has by practice assumed only the burden of going forward with sufficient evidence to establish a prima facie case on the charges in the contest complaint; the burden then shifts to the contestee to refute, by a preponderance of the evidence, the Government's case 629

MINING CLAIMS—Continued

Page

DETERMINATION OF VALIDITY—Continued

15. The United States has established a prima facie case of the invalidity of a mining claim when a qualified Government mining examiner testifies that he has examined the claim and found the mineral values insufficient to support the discovery of a valuable deposit ---------------- 629

DISCOVERY

Generally

1. A discovery of valuable minerals under Federal mining laws exists only where the minerals found are of such a character that a person of ordinary prudence would be justified in further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. Discovery requires a showing that the mineral can be presently extracted, removed, and marketed at a profit ---------------- 34

2. When land is withdrawn from location under the mining laws subsequent to the location of a mining claim, the claim must be supported by discovery at the date of withdrawal to be valid ---------------- 35

3. If a mining claimant locates a group of claims, he must establish discovery for each claim that he seeks to validate ---------------- 35

4. Land is mineral in character when known conditions engender the belief that the land contains mineral of such quantity and quality as to render its extraction profitable and justify expenditures to that end. The charge that the lands embraced by a mining claim are not mineral in character can raise two discrete issues. First, it can challenge the validity of the entire claim. Alternatively, it can be applied to placer claims which are supported by a discovery, with the effect that the claimant must show that each 10 acres of the claim are mineral in character ---------------- 35

5. The prudent man test of discovery has been satisfied where minerals have been found in sufficient quantity and of sufficient quality that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. The marketability refinement of the prudent man test of discovery requires that the mineral locator must show that by reason of accessibility, bona fides in development, proximity to market, existence of present demand, and other factors, the mineral deposit is of such value that it can be mined, removed and disposed of at a profit - 386

6. To demonstrate a sufficient discovery of oil shale under *Freeman* v. *Summers*, 52 L.D. 201 (1927), a mining claimant must show that mineral was disclosed on or before Feb. 25, 1920, in such situation and such formation that he can follow the deposit to depth with reasonable assurance that paying minerals will be found. An isolated bit of mineral, not connected with or leading to substantial prospective values, is not a sufficient discovery ---------------- 536

7. The discovery of a "valuable mineral deposit" has been made where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine ---------------- 628

8. Evidence which will not justify development of a claim but may justify further exploration is not sufficient to establish that a discovery of a valuable mineral deposit has been made ---------------- 629

MINING CLAIMS—Continued
DISCOVERY—Continued
Generally—Continued

Page

9. Where land is withdrawn from the operation of the mining laws subsequent to the location of a mining claim, the validity of the claim cannot be recognized unless the claim was supported by a valid discovery at the time of the withdrawal. In addition, even though there may have been a proper discovery at the time of a withdrawal or at some other time in the past, a mining claim cannot be considered valid unless the claim is at present supported by a sufficient discovery. The loss of the discovery, either through exhaustion of the minerals, changes in economic conditions, or other circumstances, results in the loss of the location. 629

Geologic Inference

1. Under *Freeman* v. *Summers*, 52 L.D. 201 (1927), an exposure of the Parachute Creek member, even though of limited extent, can be geologically inferred to embrace sufficient quantity of high grade oil shale so as to constitute a valuable mineral deposit 536

Marketability

1. A discovery of valuable minerals under Federal mining laws exists only where the minerals found are of such a character that a person of ordinary prudence would be justified in further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. Discovery requires a showing that the mineral can be presently extracted, removed, and marketed at a profit 34

2. Although a favorable showing of actual sales may demonstrate marketability, lack of sales is not necessarily conclusive on the issue of marketability. Lack of sales may be overcome, after all the evidence is heard, by a preponderance of the evidence showing that a prudent person could have extracted and marketed the mineral profitably 35

3. A valid mining claim for lands previously withdrawn from location must be supported by discovery as of the date of withdrawal and a showing that marketability has continued since discovery and the minerals can presently be profitably extracted 36

4. Sec. 3 of the Surface Resources Act of July 23, 1955, 69 Stat. 367, 368, 30 U.S.C. § 611 (1976), declared that common varieties of sand and gravel are not valuable mineral deposits under the mining laws. In order for a claim for such material to be sustained as validated by a discovery, the prudent man-marketability test of discovery of a valuable mineral deposit must have been met at the date of the Act, and reasonably continuously thereafter 386

5. The prudent man test of discovery has been satisfied where minerals have been found in sufficient quantity and of sufficient quality that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. The marketability refinement of the prudent man test of discovery requires that the mineral locator must show that by reason of accessibility, bona fides in development, proximity to market, existence of present demand, and other factors, the mineral deposit is of such value that it can be mined, removed and disposed of at a profit. 386

6. Where there is not sufficient reason shown to disturb an Administrative Law Judge's finding that the prudent man-marketability test was met as of July 23, 1955, and continuously thereafter by mining claimants who extracted and profitably sold sand and gravel from the claims prior to that date and continuously thereafter, the decision will be sustained on appeal 387

MINING CLAIMS—Continued Page

DISCOVERY—Continued

Marketability—Continued

7. The Board of Land Appeals will not order a further hearing in a mining claim contest case where a patent application has been filed merely because the evidentiary record is inadequate to invalidate the claims for lack of a discovery of a valuable mineral deposit, if the claimant is found to have met the discovery test ---------------- 387

8. Under *Andrus* v. *Shell Oil Co.*, ____ U.S. ____, 64 L.Ed.2d 593 (1980), 48 U.S.L.W. 4603 (June 2, 1980), oil shale is a prospectively valuable mineral and therefore present marketability need not be shown to demonstrate discovery ---------------- 535

EXCESS RESERVES

1. The charge of invalidity due to the presence of excess reserves admits that the mineral, *qua* mineral, exists within additional claims, but raises the contention that because of the quantity of mineral present in unchallenged claims owned by the mineral claimant, the mineral in the challenged claims would have no market and thus is essentially valueless ---------------- 36

HEARINGS

1. In determining the validity of a mining claim in a Government contest, the entire evidentiary record must be considered. If the Government fails to make a sufficient prima facie case against a mining claim, the claimant may move to have the contest dismissed and rest his case. However, when the claimant goes forward with his evidence, the Administrative Law Judge must consider the evidence presented and weigh it in accordance with its probative value. In choosing to rebut the case, the claimant bears the burden of doing so by a preponderance of the evidence and bears the risk of nonpersuasion if he fails ---------------- 35

LANDS SUBJECT TO

1. A Forest Service special use permit issued to a state agency does not constitute a withdrawal of the land involved from appropriation under the mining law, and a contest will not lie against a subsequently located mining claim on a charge that a portion of the claim is void to the extent that it includes land embraced by the permit ---------------- 34

2. The Outer Continental Shelf Lands Act, *as amended*, 43 U.S.C. §§ 1331–56 (Supp. II 1978), provides the exclusive authority for the development of minerals on the outer continental shelf. Mining claims situated on the outer continental shelf assertedly located pursuant to the placer provisions of the general mining law, 30 U.S.C. §§ 35–36 (1976), must be declared null and void ---------------- 478

3. A single discovery of mineral within a placer mining claim does not conclusively establish the mineral character of all the land included in the location. Whether the land embraced in the claim is mineral in character is an issue which remains open to investigation and determination by the Department until patent issues. The contestee must establish that each 10-acre tract within the entire claim is mineral in character, failing in which any nonmineral 10-acre tract is properly excluded from the patent application ---------------- 53

LOCATION

1. A Forest Service special use permit issued to a state agency does not constitute a withdrawal of the land involved from appropriation under the mining law, and a contest will not lie against a subsequently located mining claim on a charge that a portion of the claim is void to the extent that it includes land embraced by the permit ---------------- 3

MINING CLAIMS—Continued

Page

MARKETABILITY

1. Under *Andrus* v. *Shell Oil Co.*, —— U.S. ——, 64 L. Ed. 2d 593 (1980), 48 U.S.L.W. 4603 (June 2, 1980), oil shale is a prospectively valuable mineral and therefore present marketability need not be shown to demonstrate discovery 536

MINERAL LANDS

1. Land is mineral in character when known conditions engender the belief that the land contains mineral of such quantity and quality as to render its extraction profitable and justify expenditures to that end. The charge that the lands embraced by a mining claim are not mineral in character can raise two discrete issues. First, it can challenge the validity of the entire claim. Alternatively, it can be applied to placer claims which are supported by a discovery, with the effect that the claimant must show that each 10 acres of the claim are mineral in character 35

PLACER CLAIMS

1. Under *Andrus* v. *Shell Oil Co.*, —— U.S. ——, 64 L. Ed. 2d 593 (1980), 48 U.S.L.W. 4603 (June 2, 1980), oil shale is a prospectively valuable mineral and therefore present marketability need not be shown to demonstrate discovery 536
2. To demonstrate a sufficient discovery of oil shale under *Freeman* v. *Summers*, 52 L.D. 201 (1927), a mining claimant must show that mineral was disclosed on or before Feb. 25, 1920, in such situation and such formation that he can follow the deposit to depth with reasonable assurance that paying minerals will be found. An isolated bit of mineral, not connected with or leading to substantial prospective values, is not a sufficient discovery 536

RECORDATION

1. It is proper to refuse to accept notices of location of mining claims submitted for recordation pursuant to sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976), when the claims are null and void because they are filed for lands on the outer continental shelf 479

WITHDRAWN LAND

1. A Forest Service special use permit issued to a state agency does not constitute a withdrawal of the land involved from appropriation under the mining law, and a contest will not lie against a subsequently located mining claim on a charge that a portion of the claim is void to the extent that it includes land embraced by the permit 34
2. When land is withdrawn from location under the mining laws subsequent to the location of a mining claim, the claim must be supported by discovery at the date of withdrawal to be valid 35
3. A valid mining claim for lands previously withdrawn from location must be supported by discovery as of the date of withdrawal and a showing that marketability has continued since discovery and the minerals can presently be profitably extracted 36
4. A mining claim located on land temporarily segregated from appropriation under the mining laws pursuant to 43 U.S.C. § 1714(b) (1976) is null and void ab initio 462
5. Under 43 U.S.C. § 1714(b) (1976) a publication in the *Federal Register* of notification of an application for withdrawal, which publication temporarily segregates land from the operation of the mining laws, does not withdraw the land, and therefore the notice need not be signed by

MINING CLAIMS—Continued

WITHDRAWN LAND—Continued Page

the Secretary or an individual in the Office of the Secretary who has been appointed by the President, by and with the advice and consent of the Senate ---- 462

6. Where land is withdrawn from the operation of the mining laws subsequent to the location of a mining claim, the validity of the claim cannot be recognized unless the claim was supported by a valid discovery at the time of the withdrawal. In addition, even though there may have been a proper discovery at the time of a withdrawal or at some other time in the past, a mining claim cannot be considered valid unless the claim is at present supported by a sufficient discovery. The loss of the discovery, either through exhaustion of the minerals, changes in economic conditions, or other circumstances, results in the loss of the location ---- 629

NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

(*See also* Environmental Policy Act—if included in this Index.)

GENERALLY

1. Public Land Order No. 2676 (1962), requires the approval of an authorized officer of the Department of the Army before the Secretary of the Interior can grant a right-of-way over lands subject to the public land order. The Department of the Interior has no authority to grant a right-of-way where the approval is withheld ---- 21
2. The National Historic Preservation Act, Outer Continental Shelf Lands Act and National Environmental Policy Act authorize a stipulation which provides that a cultural resource included on or eligible for inclusion on the National Register which is discovered by an OCS lessee as a result of lease operations and which is salvaged, be made reasonably available to recognized scientific or educational institutions for study ---- 593

NATIONAL HISTORIC PRESERVATION ACT

GENERALLY

1. Sec. 106 of the National Historic Preservation Act requires an agency granting a right-of-way over Federal lands for a pipeline or other linear project to (1) identify potentially affected cultural resources; (2) consult regarding such effect with the Advisory Council on Historic Preservation; and (3) to consider these cultural resources in making or denying the grant. A rule of reason applies as to the scope of the lands to be inventoried, and the degree of effort required ---- 27
2. Sec. 106 of the National Historic Preservation Act places a duty upon the Department to insure that issuance of authorizations on the OCS will not affect significant cultural resources without providing the Advisory Council on Historic Preservation the opportunity to comment. A rule of reason applies to the extent of the OCS lands to be studied and the degree of effort required ---- 593
3. Archival research is first required to determine whether significant cultural resources may be affected by activities on an OCS lease or right-of-way ---- 593
4. Cultural resource surveys should only be undertaken when the results of archival research indicate the likelihood that significant cultural resource will be affected by the undertaking and that the resource is capable of being detected at a reasonable cost and effort ---- 593

NATIONAL HISTORIC PRESERVATION ACT—Continued

GENERALLY—Continued Page

5. When cultural resources are identified on the OCS, it is appropriate to consider them for nomination to the National Register of Historic Places 593
6. Sec. 106 of the National Historic Preservation Act authorizes the Department to require either by regulation or by stipulation in an OCS lease or right-of-way that the lessee or holder make cultural resource studies where evidence indicates that such resources may be affected by operations, and that information discovered be made available to the Department 593
7. The National Historic Preservation Act, Outer Continental Shelf Lands Act and National Environmental Policy Act authorize a stipulation which provides that a cultural resource included on or eligible for inclusion on the National Register which is discovered by an OCS lessee as a result of lease operations and which is salvaged, be made reasonably available to recognized scientific or educational institutions for study 593
8. The Outer Continental Shelf is not within the jurisdiction of a State Historic Preservation Office (SHPO). However, as a matter of comity, the recommendations of a SHPO as to OCS cultural resources should be carefully considered 593

APPLICABILITY

1. The grant of a right-of-way over Federal land for a pipeline or other linear project is a Federal undertaking which requires the authorizing agency to comply with sec. 106 of the National Historic Preservation Act, as implemented by 36 CFR Part 800 27
2. Sec. 106 of the National Historic Preservation Act requires an agency granting a right-of-way over Federal lands for a pipeline or other linear project to identify and consider cultural resources on non-Federal lands affected by construction activities on Federal lands. 36 CFR 800.4(a) 27
3. Sec. 106 of the National Historic Preservation Act requires an agency granting a right-of-way over Federal lands for a pipeline or other linear project to identify and consider cultural resources on non-Federal lands which may foreseeably be affected by the grant of the right-of-way. A rule of reason applies in determining the extent of non-Federal lands on which cultural resources are to be identified, and the degree of effort required. 36 CFR 800.4(a) 27
4. In the grant of a right-of-way over Federal lands for a pipeline or other linear project, the scope of lands to which the requirements of sec. 106 of the National Historic Preservation Act apply may be analogous to the scope of lands to be considered pursuant to sec. 102 of the National Environmental Policy Act 27

NOTICE

GENERALLY

1. Any document which is sent by certified mail to an individual at his record address is considered to have been served at the time of return by the post office of the undelivered certified letter, such constructive service being equivalent in legal effect to actual service of the document 610

NOTICE—Continued

GENERALLY—Continued Page

2. Where BLM sends by certified mail a notice to an offeror at his record address that he must file a certificate as to his qualification to hold an oil and gas lease, and the letter is returned to BLM marked "Not Deliverable as Addressed, Unable to Forward," and it is established that nondelivery was due to post office error, the appellant will not be considered to have received notice, and the rejection of the lease offer will be set aside ---------- 612

OIL AND GAS LEASES

(*See also* Mineral Leasing Act, Outer Continental Shelf Lands Act—if included in this Index.)

GENERALLY

1. Sec. 28 of the Mineral Leasing Act of 1920, 30 U.S.C. § 185 (1976), is not applicable to on-lease oil and gas production facilities which are included in a surface use and operations plan, and which are authorized by the approval of an application to conduct leasehold operations or construction activities ---------- 291

2. Sec. 29 of the Mineral Leasing Act of 1920, 30 U.S.C. § 186 (1976), has consistently been interpreted as not providing authority separate from sec. 28 of the Mineral Leasing Act, 30 U.S.C. § 185 (1976), for oil and gas pipeline rights-of-way. Instead, it reserves to the United States the right to allow other rights-of-way or to lease other minerals on Federal land already leased for the extraction of one mineral, and allows the reservation of the right to dispose of the surface of land leased for mineral extraction "insofar as said surface is not necessary to the use of the lessee in extracting and removing deposits thereon" ---------- 291

3. The Secretary has broad power to regulate all on-lease activities by oil and gas lessees and operators pursuant to the conditions contained in oil and gas leases and his general regulatory authority under the Mineral Leasing Act. The procedures for regulating activities on oil and gas leases, established under Secretarial Order 2948 and the BLM-USGS Cooperative Procedures Agreement implementing that order, reserve to the Department the authority to protect the United States legal interests in the property. The Secretary has broad discretion either to continue this procedure, or to substitute any other delegation of his authority and any other reasonable regulatory procedure which he concludes would equally protect the United States interests ---------- 291

4. All facilities related to an oil and gas lease which are located on Federal land outside the lease, regardless of their nature, may be constructed only after appropriate rights-of-way have been granted. Similarly, on-lease oil and gas transportation facilities and on-lease commercial facilities require rights-of-way. Depending on the nature of the facility, the right-of-way would be granted pursuant to either sec. 28 of the Mineral Leasing Act of 1920, 30 U.S.C. § 185 (1976), or Title V of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1761–1771 (1976) ---------- 291

5. Although under the Departmental regulations a competitive bidder in an oil and gas lease sale, must, where there is another party in interest, submit the signed statements required by 43 CFR 3102.7, failure to comply with the regulation does not require rejection of the bid. This result follows because in noncompetitive offerings the critical element

OIL AND GAS LEASES—Continued

GENERALLY—Continued Page

is determining the first qualified offeror. For competitive bidding, the amount of the bid replaces priority of filing as the dominant factor 497

6. Where BLM sends by certified mail a notice to an offeror at his record address that he must file a certificate as to his qualification to hold an oil and gas lease, and the letter is returned to BLM marked "Not Deliverable as Addressed, Unable to Forward," and it is established that nondelivery was due to post office error, the appellant will not be considered to have received notice, and the rejection of the lease offer will be set aside 612

APPLICATIONS

Generally

1. An oil and gas lease offer filed in the name of a corporation in a simultaneous filing is properly rejected where it is not accompanied either by corporate qualification papers or by any reference to a serial number where such information might be found, as required by 43 CFR 3102.4–1. Such omissions cannot be cured after the drawing 110

2. Where a corporate simultaneous oil and gas lease offeror alleges no facts which could disprove its failure to comply with 43 CFR 3102.4–1, no hearing will be granted as requested 110

3. An entry card in a simultaneous oil and gas lease drawing need not be rejected under 43 CFR 3112.2–1(a) where the offeror's name and address are affixed with a rubber stamp outside the preprinted boxes but are otherwise legible and in the designated manner on the face of the card 465

Drawings

1. "Interest in an oil and gas lease or offer." Where a party to a pooling agreement is authorized to advance funds for filing of drawing entry cards in simultaneous oil and gas lease drawings, payment of rentals, and office expenses, and is entitled to be reimbursed therefor with interest and receive a consultation fee from the pooled proceeds of any leases issued, all parties to the agreement have an interest in each lease offer within the meaning of 43 CFR 3102.7, requiring the disclosure of interested parties 465

2. Where a party to a pooling agreement is authorized to advance funds for filing drawing entry cards in simultaneous oil and gas lease drawings, payment of rentals, and office expenses, and is entitled to be reimbursed therefor and receive a consultation fee from the pooled proceeds of the sale or assignment of any lease issued, the filing in a lease drawing for a particular parcel by more than one party to the agreement constitutes a multiple filing in violation of 43 CFR 3112.5–2 465

3. An entry card in a simultaneous oil and gas lease drawing need not be rejected under 43 CFR 3112.2–1(a) where the offeror's name and address are affixed with a rubber stamp outside the preprinted boxes but are otherwise legible on the face of the card 465

Sole Party in Interest

1. "Interest in an oil and gas lease or offer." Where a party to a pooling agreement is authorized to advance funds for filing of drawing entry cards in simultaneous oil and gas lease drawings, payment of rentals, and office expenses, and is entitled to be reimbursed therefor with interest and receive a consultation fee from the pooled proceeds of any leases

OIL AND GAS LEASES—Continued

APPLICATIONS—Continued

Sole Party in Interest—Continued Page

issued, all parties to the agreement have an interest in each lease offer within the meaning of 43 CFR 3102.7 requiring the disclosure of interested parties 465

2. Although under the Departmental regulations a competitive bidder in an oil and gas lease sale, must, where there is another party in interest, submit the signed statements required by 43 CFR 3102.7, failure to comply with the regulation does not require rejection of the bid. This result follows because in noncompetitive offerings the critical element is determining the first qualified offeror. For competitive bidding, the amount of the bid replaces priority of filing as the dominant factor. 497

COMMUNITIZATION AGREEMENTS

1. Federal lands included in a unit agreement approved pursuant to 30 CFR Part 226 or a communitization agreement approved pursuant to 43 CFR 3105.2 are treated like an individual oil and gas leasehold for the purpose of determining whether rights-of-way are required for facilities located thereon 291

COMPETITIVE LEASES

1. Although under the Departmental regulations at competitive bidder in an oil and gas lease sale, must, where there is another party in interest, submit the signed statements required by 43 CFR 3102.7, failure to comply with the regulation does not require rejection of the bid. This result follows because in noncompetitive offerings the critical element is determining the first qualified offeror. For competitive bidding, the amount of the bid replaces priority of filing as the dominant factor ... 497

DRAINAGE

1. An order by a Conservation Manager of the Geological Survey directing oil and gas lessees of Outer Continental Shelf lands to subscribe to a unit plan allocating production from a specific reservoir on the basis of original net acre-feet of gas-bearing sand, *i.e.*, the volume of gas-bearing sand in place prior to production of any gas from the reservoir, will be affirmed where such a plan of allocation of production is in common use on OCS lands and it has not been shown that the order is arbitrary or capricious 648

FIRST-QUALIFIED APPLICANT

1. An oil and gas lease offer filed in the name of a corporation in a simultaneous filing is properly rejected where it is not accompanied either by corporate qualification papers or by any reference to a serial number where such information might be found, as required by 43 CFR 3102.4–1. Such omissions cannot be cured after the drawing 110

ROYALTIES

1. The Crude Oil Windfall Profit Tax Act, P.L. 96–223, 94 Stat. 229 (1980) imposes the windfall profit tax on Federal oil royalty revenue. The states have no economic interest, as that phrase is used in the Windfall Profit Tax Act, in Federal royalty revenue that would exempt their share from taxation. Moreover, revenue from the windfall profit tax cannot be treated as royalty revenue and be distributed to the states under sec. 35 of the Mineral Leasing Act, *as amended*, 30 U.S.C. § 191 (1976). Accordingly, the states' share of Federal oil royalties must be based upon after-tax royalty revenue 661

OIL AND GAS LEASES—Continued

STIPULATIONS Page

1. The Secretary has broad power to regulate all on-lease activities by oil and gas lessees and operators pursuant to the conditions contained in oil and gas leases and his general regulatory authority under the Mineral Leasing Act. The procedures for regulating activities on oil and gas leases, established under Secretarial Order 2948 and the BLM–USGS Cooperative Procedures Agreement implementing that order, reserve to the Department the authority to protect the United States legal interests in the property. The Secretary has broad discretion either to continue this procedure, or to substitute any other delegation of his authority and any other reasonable regulatory procedure which he concludes would equally protect the United States interests ---------- 291

UNIT AND COOPERATIVE AGREEMENTS

1. Federal lands included in a unit agreement approved pursuant to 30 CFR Part 226 or a communitization agreement approved pursuant to 43 CFR 3105.2 are treated like an individual oil and gas leasehold for the purpose of determining whether rights-of-way are required for facilities located thereon ---------- 291
2. The authority to segregate partially unitized oil and gas leases must be clear, since segregation creates two new leases from a single lease and fundamentally modifies a lessee's legal rights and obligations. Such authority will not be presumed or extrapolated from a general grant of regulatory authority ---------- 616
3. An order by a Conservation Manager of the Geological Survey directing oil and gas lessees of Outer Continental Shelf lands to subscribe to a unit plan allocating production from a specific reservoir on the basis of original net acre-feet of gas-bearing sand, *i.e.*, the volume of gas-bearing sand in place prior to production of any gas from the reservoir, will be affirmed where such a plan of allocation of production is in common use on OCS lands and it has not been shown that the order is arbitrary or capricious ---------- 648

OUTER CONTINENTAL SHELF LANDS ACT

(*See also* Oil & Gas Leases—if included in this Index.)

GENERALLY

1. The Outer Continental Shelf Lands Act, *as amended*, 43 U.S.C. §§ 1331–56 (Supp. II 1978), provides the exclusive authority for the development of minerals on the outer continental shelf. Mining claims situated on the outer continental shelf assertedly located pursuant to the placer provisions of the general mining law, 30 U.S.C. §§ 35–36 (1976), must be declared null and void ---------- 478
2. Apart from control over authorizations to exploit the mineral resources of the OCS, the Department has no authority to regulate activities affecting mineral resources on the OCS ---------- 593
3. The National Historic Preservation Act, Outer Continental Shelf Lands Act and National Environmental Policy Act authorize a stipulation which provides that a cultural resource included on or eligible for inclusion on the National Register which is discovered by an OCS lessee as a result of lease operations and which is salvaged, be made reasonably available to recognized scientific or educational institutions for study ---------- 593

OUTER CONTINENTAL SHELF LANDS ACT—Continued

GENERALLY—Continued Page

4. The legislative history of the OCS Lands Act shows that the Secretary is authorized to modify and incorporate the regulatory provisions of the Mineral Leasing Act, as they existed in 1953 when the OCS Lands Act was passed, into OCS leasing regulations as the circumstances of offshore leasing make appropriate ... 616
5. The Secretary generally is free to adopt any reasonable regulatory measures which he determines to be necessary and proper to prevent waste, conserve natural resources, protect correlative rights, or carry out the leasing provisions of the OCS Lands Act, regardless of whether such measures are expressly listed in either the Act or the Mineral Leasing Act ... 616

GEOLOGICAL AND GEOPHYSICAL EXPLORATION

Generally

1. A deep stratigraphic test, whether drilled on or off a structure believed to hold oil or gas, is a kind of geological exploration. Therefore, the Secretary has the authority to allow prelease on-structure tests under sec. 11 of the Outer Continental Shelf Lands Act ... 517

Reimbursement

1. The U.S. Geological Survey must pay permittees reasonable reproduction costs for geological data and information submitted under sec. 26 ... 563

OIL AND GAS INFORMATION PROGRAM

Reimbursement

1. The U.S. Geological Survey has a right to look at all of a lessee's geological and geophysical data and information. If it keeps the lessee's copy, it must pay the lessee a reasonable sum for reproduction costs. In certain situations, the Survey must also pay the lessee a reasonable sum for processing geophysical data ... 563

Secretary's Access to Data and Information

1. Sec. 26(a)(1)(A) applies to geological and geophysical data and information only. Other types of data and information are gathered under other sections of the Act ... 563
2. The Secretary may require permittees to ship data and information to him for review. If he then decides to keep them, he must pay the reimbursement required by sec. 26 ... 563

OIL AND GAS LEASES

1. The Secretary's mandate under the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 *et seq.* (Supp. II 1978), to administer and supervise development and production of the oil and gas resources of the OCS could not be accomplished without the authority to require development and production plans from oil and gas lessees in the Gulf of Mexico ... 544
2. Sec. 25 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1351 (Supp. II 1978) does not deprive the Secretary of authority to require development and production plans for oil and gas leases in the Gulf of Mexico ... 544
3. Secs. 25(a)(1) and (b) of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1351(a)(1) and (b) (Supp. II 1978), exempt oil and gas lessees in the Gulf of Mexico and OCS lessees who have discovered oil or gas in paying quantities at the time of enactment of these sections from submitting development and production plans which meet the requirements of sec. 25 of the Act ... 544

OUTER CONTINENTAL SHELF LANDS ACT—Continued

OIL AND GAS LEASES—Continued Page

4. The Secretary need not apply the criteria of sec. 25(c) of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1351(c) (Supp. II 1978), which describe the contents of a development and production plan, to lessees in the western Gulf of Mexico if the full range of information required by sec. 25(c) is not necessary for effective administration of the exempted leases ---------- 544
5. The submission of environmental reports is not necessary for oil and gas lessees in the Gulf of Mexico except where the environmental information in the report is necessary for a state with an approved coastal zone management plan to make a consistency determination or is necessary for the Secretary to carry out his statutory responsibilities ---------- 544
6. No environmental impact statements need be prepared prior to the approval of development and production plans for oil and gas leases in the western Gulf of Mexico ---------- 544
7. The Secretary is not required to follow the approval time frames set out in sec. 25(g) and (h) of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1351(g) and (h) (Supp. II 1978), when considering development and production plans submitted by oil and gas lessees in the western Gulf of Mexico ---------- 545
8. Oil and gas leases in the western Gulf of Mexico are not exempt from the requirement in sec. 19 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1345 (Supp. II 1978), which provides that the Governor of any affected state and the executive of any affected local government in such state shall have a 60-day period, prior to the approval of a development and production plan for a lessee to submit recommendations to the Secretary ---------- 545
9. Oil and gas lessees in the western Gulf of Mexico are not exempt from sec. 5(a)(8) of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1334(a)(8) (Supp. II 1978), requiring that lessees comply with air quality standards to the extent that authorized activities significantly affect the air quality of any state ---------- 545
10. Western Gulf of Mexico lessees conducting activities for which a Federal license or permit is required and which affect any land use or water use in the coastal zone of a state with an approved state coastal zone management program are not exempt from the federal consistency requirements of sec. 25(d) and (h) of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1351(d) and (h) (Supp. II 1978) ---------- 545
11. The Secretary is authorized to require the prompt and efficient exploration and development of the entire area of each offshore oil and gas lease by § 5 of the OCS Lands Act, various regulations, the terms of each lease, and, in some cases, implied covenants of diligent development --- 617
12. An order by a Conservation Manager of the Geological Survey directing oil and gas lessees of Outer Continental Shelf lands to subscribe to a unit plan allocating production from a specific reservoir on the basis of original net acre-feet of gas-bearing sand, *i.e.*, the volume of gas-bearing sand in place prior to production of any gas from the reservior, will be affirmed where such a plan of allocation of production is in common use on OCS lands and it has not been shown that the order is arbitrary or capricious ---------- 648

OUTER CONTINENTAL SHELF LANDS ACT—Continued

UNIT PLANS Page

1. Sec. 5 of the OCS Lands Act implicitly authorizes the Secretary to require compulsory unitization of offshore oil and gas leases 616
2. The Secretary is not authorized to require compulsory segregation of an offshore oil and gas lease when part of it is committed to a unit agreement 616
3. Sec. 5 of the OCS Lands Act of 1953 does not provide the clear authority required to permit segregation of OCS leases, since it neither expressly mentions the power to segregate nor incorporates the segregation authority added to the Mineral Leasing Act in 1954 616
4. The U.S. Geological Survey may not condition its approval of any unit agreement or development plan for an offshore oil and gas lease upon the lessee's consent to segregation 616
5. An order by a Conservation Manager of the Geological Survey directing oil and gas lessees of Outer Continental Shelf lands to subscribe to a unit plan allocating production from a specific reservoir on the basis of original net acre-feet of gas-bearings sand, *i.e.*, the volume of gas-bearing sand in place prior to production of any gas from the reservoir, will be affirmed where such a plan of allocation of production is in common use on OCS lands and it has not been shown that the order is arbitrary or capricious 648

PATENTS OF PUBLIC LANDS

DEPARTMENT OF THE INTERIOR INSTRUCTION, 44 L.D. 513 (1916)

1. The Federal interest retained in an authorized improvement constructed and maintained under principles of *Instructions*, 44 L.D. 513 (1916), is limited to the improvement itself. The exception for the improvement is inserted in a patent for the purpose of giving public notice that the improvement is there; eliminating the improvement from the conveyance; and for assuring any attendant right of the Federal Government to go onto the land for purposes consistent with its ownership in the improvement 480
2. A notation on the land records of a 44 L.D. 513, interest must be removed, and no reservation of such interest can be included on subsequent patents, when the subject improvement is no longer needed or used for or by the United States 480

PHOSPHATE LEASES AND PERMITS

LEASES

1. In determining whether a permittee is entitled to a preference right lease the Secretary must consider all legal and economic conditions affecting the proposed operation of the lease as of the time of the determination, including the applicable statutory minimum production royalty rate. A preference right lease must provide for a production royalty rate in conformity with the statutory minimum rate applicable at the time of issuance 69

ROYALTIES

1. In determining whether a permittee is entitled to a preference right lease the Secretary must consider all legal and economic conditions affecting the proposed operation of the lease as of the time of the determination, including the applicable statutory minimum production royalty rate. A preference right lease must provide for a production royalty rate in conformity with the statutory minimum rate applicable at the time of issuance 69

POTASSIUM LEASES AND PERMITS

LEASES Page

1. In determining whether a permittee is entitled to a preference right lease the Secretary must consider all legal and economic conditions affecting the proposed operation of the lease as of the time of the determination, including the applicable statutory minimum production royalty rate. A preference right lease must provide for a production royalty rate in conformity with the statutory minimum rate applicable at the time of issuance ---------- 69

ROYALTIES

1. In determining whether a permittee is entitled to a preference right lease the Secretary must consider all legal and economic conditions affecting the proposed operation of the lease as of the time of the determination, including the applicable statutory minimum production royalty rate. A preference right lease must provide for a production royalty rate in conformity with the statutory minimum rate applicable at the time of issuance ---------- 69

PUBLIC SALES

PREFERENCE RIGHTS

1. An assertion of a preference right to purchase public land offered for public sale pursuant to the Unintentional Trespass Act of Sept. 26, 1968, 82 Stat. 870 (43 U.S.C. §§ 1431–1435 (1976)) (now covered by the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701, 1722 (1976)), is improperly rejected when the applicant submits satisfactory equitable proof of his "ownership" of contiguous lands by showing that he has contracted to purchase such land, has made at least partial payment therefor, and is in possession thereof ---------- 350

REGULATIONS

(*See also* Administrative Procedure—if included in this Index.)

APPLICABILITY

1. Where the holder of a coal prospecting permit completes his exploration and applies for a preference right coal lease in 1973, the application must be adjudicated on the basis of the applicant's subsequent conformity with regulations amended in 1976 with retroactive effect. However, where the application is summarily rejected solely for the reason that the applicant's supplemental submission is "inadequate," without identifying the deficiency, the decision will be vacated and the case remanded for readjudication ---------- 14

INTERPRETATION

1. An assertion of a preference right to purchase public land offered for public sale pursuant to the Unintentional Trespass Act of Sept. 26, 1968, 82 Stat. 870 (43 U.S.C. §§ 1431–1435 (1976)) (now covered by the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§1701, 1722 (1976)), is improperly rejected when the applicant submits satisfactory equitable proof of his "ownership" of contiguous lands by showing that he has contracted to purchase such land, has made at least partial payment therefor, and is in possession thereof ---------- 350

RIGHTS-OF-WAY

(*See also* Indian Lands, Reclamation Lands—if included in this Index.)

GENERALLY

1. Public Land Order No. 2676 (1962), requires the approval of an authorized officer of the Department of the Army before the Secretary of the Interior can grant a right-of-way over lands subject to the public land order. The Department of the Interior has no authority to grant a right-of-way where the approval is withheld ---------- 21

RIGHTS-OF-WAY—Continued Page

GENERALLY—Continued

2. In reviewing a decision to grant a right-of-way based upon an environmental analysis report, the decision will be upheld where the record evidences consideration of all available information and a reasoned analysis of the factors involved, made in due regard for the public interest 21
3. The grant of a right-of-way over Federal land for a pipeline or other linear project is a Federal undertaking which requires the authorizing agency to comply with sec. 106 of the National Historic Preservation Act, as implemented by 36 CFR Part 800 27

ACT OF FEBRUARY 25, 1920

1. Sec. 28 of the Mineral Leasing Act of 1920, 30 U.S.C. § 185 (1976), is not applicable to on-lease oil and gas production facilities which are included in a surface use and operations plan, and which are authorized by the approval of an application to conduct leasehold operations or construction activities 291
2. Federal lands included in a unit agreement approved pursuant to 30 CFR Part 226 or a communitization agreement approved pursuant to 43 CFR 3105.2 are treated like an individual oil and gas leasehold for the purpose of determining whether rights-of-way are required for facilities located thereon 291
3. Sec. 29 of the Mineral Leasing Act of 1920, 30 U.S.C. § 186 (1976), has consistently been interpreted as not providing authority separate from sec. 28 of the Mineral Leasing Act, 30 U.S.C. § 185 (1976), for oil and gas pipeline rights-of-way. Instead, it reserves to the United States the right to allow other rights-of-way or to lease other minerals on Federal land already leased for the extraction of one mineral, and allows the reservation of the right to dispose of the surface of land leased for mineral extraction "insofar as said surface is not necessary to the use of the lessee in extracting and removing deposits thereon" 291
4. All facilities related to an oil and gas lease which are located on Federal land outside the lease, regardless of their nature, may be constructed only after appropriate rights-of-way have been granted. Similarly, on-lease oil and gas transportation facilities and on-lease commercial facilities require rights-of-way. Depending on the nature of the facility, the right-of-way would be granted pursuant to either sec. 28 of the Mineral Leasing Act of 1920, 30 U.S.C. § 185 (1976), or Title V of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1761–1771 (1976) 291

APPLICATIONS

1. The Federal Land Policy and Management Act of 1976 authorizes the Bureau of Land Management to recover reasonable costs including costs of environmental analyses for applications of rights-of-way across public lands 473
2. Costs not directly associated with the processing or monitoring of a right-of-way application, such as evaluation of the mine to be served by the rights-of-way, are not authorized by the Federal Land Policy and Management Act of 1976 and are not reimbursable pursuant to 43 CFR 2802.1–2 473
3. Management overhead costs are not recoverable from right-of-way applicants under 43 CFR 2802.1–2 473

RIGHTS-OF-WAY—Continued

Page

CONDITIONS AND LIMITATIONS

1. Sec. 106 of the National Historic Preservation Act requires an agency granting a right-of-way over Federal lands for a pipeline or other linear project to (1) identify potentially affected cultural resources; (2) consult regarding such effect with the Advisory Council on Historic Preservation; and (3) to consider these cultural resources in making or denying the grant. A rule of reason applies as to the scope of the lands to be inventoried, and the degree of effort required -------- 27
2. The grant of a right-of-way over Federal land for a pipeline or other linear project is a Federal undertaking which requires the authorizing agency to comply with sec. 106 of the National Historic Preservation Act, as implemented by 36 CFR Part 800 -------- 27
3. Sec. 106 of the National Historic Preservation Act requires an agency granting a right-of-way over Federal lands for a pipeline or other linear project to identify and consider cultural resources on non-Federal lands affected by construction activities on Federal lands. 36 CFR 800.4(a) -------- 27
4. Sec. 106 of the National Historic Preservation Act requires an agency granting a right-of-way over Federal lands for a pipeline or other linear project to identify and consider cultural resources on non-Federal lands which may foreseeably be affected by the grant of the right-of-way. A rule of reason applies in determining the extent of non-Federal lands on which cultural resources are to be identified, and the degree of effort required. 36 CFR 800.4(a) -------- 27
5. In the grant of a right-of-way over Federal lands for a pipeline or other linear project, the scope of lands to which the requirements of sec. 106 of the National Historic Preservation Act apply may be analogous to the scope of lands to be considered pursuant to sec. 102 of the National Environmental Policy Act -------- 27

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976

1. Public Land Order No. 2676 (1962), requires the approval of an authorized officer of the Department of the Army before the Secretary of the Interior can grant a right-of-way over lands subject to the public land order. The Department of the Interior has no authority to grant a right-of-way where the approval is withheld -------- 21
2. All facilities related to an oil and gas lease which are located on Federal land outside the lease, regardless of their nature, may be constructed only after appropriate rights-of-way have been granted. Similarly, on-lease oil and gas transportation facilities and on-lease commercial facilities require rights-of-way. Depending on the nature of the facility, the right-of-way would be granted pursuant to either sec. 28 of the Mineral Leasing Act of 1920, 30 U.S.C. § 185 (1976), or Title V of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1761–1771 (1976) -------- 291
3. The Federal Land Policy and Management Act of 1976 authorizes the Bureau of Land Management to recover reasonable costs including costs of environmental analyses for applications of rights-of-way across public lands -------- 473
4. Costs not directly associated with the processing or monitoring of a right-of-way application, such as evaluation of the mine to be served by the rights-of-way, are not authorized by the Federal Land Policy and Management Act of 1976 and are not reimbursable pursuant to 43 CFR 2802.1–2 -------- 473

Page

RULES OF PRACTICE

(*See also* Administrative Procedure, Appeals, Contests & Protests, Contracts, Hearings, Indian Probate, Practice Before the Department—if included in this Index.)

GENERALLY

1. Any document which is sent by certified mail to an individual at his record address is considered to have been served at the time of return by the post office of the undelivered certified letter, such constructive service being equivalent in legal effect to actual service of the document ---- 610

APPEALS

Burden of Proof

1. The assertion that annual assessment work has not been performed is the assertion of a negative fact. If an examination of the mining claims and the nearby lands does not reveal the accomplishment of the required work, and there is no record of any such work having been performed, then evidence to this effect would be sufficient to establish a prima facie case. It would then devolve upon the claimant to show by a preponderance of the countervailing evidence that he has substantially complied with the statute ---- 249
2. In a Government contest proceeding to determine the validity of a mining claim, the claimant is always the proponent of the rule or order, always the one claiming to have earned the benefit of the mining laws through his compliance therewith. Regardless of whether the issue on which the validity of the claim rests is discovery, mode of location, or performance of assessment work, the relative position and obligation of the contestant and the contestee remain the same ---- 249

Motions

1. The Government's motion for reconsideration, which contends that the current version of the Limitation of Cost clause does not entitle a contractor to additional funding for a change unless the contracting officer specifically increases the estimated cost, provides no basis for overturning the Board's principal decision allowing excess costs attributable to a constructive change, where the contracting officer was given advance notice that the estimated costs would be exceeded and took no action to advise the contractor that no funding would be provided or to stop the project officer from asking for continued performance of the changed work ---- 7

Reconsideration

1. The Government's motion for reconsideration, which contends that the current version of the Limitation of Cost clause does not entitle a contractor to additional funding for a change unless the contracting officer specifically increases the estimated cost, provides no basis for overturning the Board's principal decision allowing excess costs attributable to a constructive change, where the contracting officer was given advance notice that the estimated costs would be exceeded and took no action to advise the contractor that no funding would be provided or to stop the project officer from asking for continued performance of the changed work ---- 7

Statement of Reasons

1. The Government's motion for reconsideration, which contends that the current version of the Limitation of Cost clause does not entitle a contractor to additional funding for a change unless the contracting officer specifically increases the estimated cost, provides no basis for

RULES OF PRACTICE—Continued

APPEALS—Continued

Statement of Reasons—Continued Page

overturning the Board's principal decision allowing excess costs attributable to a constructive change, where the contracting officer was given advance notice that the estimated costs would be exceeded and took no action to advise the contractor that no funding would be provided or to stop the project officer from asking for continued performance of the changed work 7

EVIDENCE

1. In determining the validity of a mining claim in a Government contest, the entire evidentiary record must be considered. If the Government fails to make a sufficient prima facie case against a mining claim, the claimant may move to have the contest dismissed and rest his case. However, when the claimant goes forward with his evidence, the Administrative Law Judge must consider the evidence presented and weigh it in accordance with its probative value. In choosing to rebut the case, the claimant bears the burden of doing so by a preponderance of the evidence and bears the risk of nonpersuasion if he fails 35

GOVERNMENT CONTESTS

1. In determining the validity of a mining claim in a Government contest, the entire evidentiary record must be considered. If the Government fails to make a sufficient prima facie case against a mining claim, the claimant may move to have the contest dismissed and rest his case. However, when the claimant goes forward with his evidence, the Administrative Law Judge must consider the evidence presented and weigh it in accordance with its probative value. In choosing to rebut the case, the claimant bears the burden of doing so by a preponderance of the evidence and bears the risk of nonpersuasion if he fails 35
2. In a mining contest, a matter not charged in the complaint cannot be used as a ground to invalidate a claim, unless it has been raised at the hearing and the contestee has not objected 36
3. The assertion that annual assessment work has not been performed is the assertion of a negative fact. If an examination of the mining claims and the nearby lands does not reveal the accomplishment of the required work, and there is no record of any such work having been performed, then evidence to this effect would be sufficient to establish a prima facie case. It would then devolve upon the claimant to show by a preponderance of the countervailing evidence that he has substantially complied with the statute 249
4. In a Government contest proceeding to determine the validity of a mining claim, the claimant is always the proponent of the rule or order, always the one claiming to have earned the benefit of the mining laws through his compliance therewith. Regardless of whether the issue on which the validity of the claim rests is discovery, mode of location, or performance of assessment work, the relative position and obligation of the contestant and the contestee remain the same 249
5. Where the Government contests the validity of a mining claim for nonperformance of annual assessment work, there is nothing inherent or implied in that action which requires a conclusion that the claim is valid in all other respects, nor may the bringing of such an action be treated as tantamount to an admission by the Government that "property rights in the claim have been established by the making of a valid location." 249

RULES OF PRACTICE—Continued

HEARINGS Page.

1. In a mining contest, a matter not charged in the complaint cannot be used as a ground to invalidate a claim, unless it has been raised at the hearing and the contestee has not objected 36
2. Where a corporate simultaneous oil and gas lease offeror alleges no facts which could disprove its failure to comply with 43 CFR 3102.4–1, no hearing will be granted as requested 110
3. The Board of Land Appeals will not order a further hearing in a mining claim contest case where a patent application has been filed merely because the evidentiary record is inadequate to invalidate the claims for lack of a discovery of a valuable mineral deposit, if the claimant is found to have met the discovery test 387

SECRETARY OF THE INTERIOR

(*See also* Administrative Authority—if included in this Index.)

1. The Secretary has broad power to regulate all on-lease activities by oil and gas lessees and operators pursuant to the conditions contained in oil and gas leases and his general regulatory authority under the Mineral Leasing Act. The procedures for regulating activities on oil and gas leases, established under Secretarial Order 2948 and the BLM-USGS Cooperative Procedures Agreement implementing that order, reserve to the Department the authority to protect the United States legal interests in the property. The Secretary has broad discretion either to continue this procedure, or to substitute any other delegation of his authority and any other reasonable regulatory procedure which he concludes would equally protect the United States interests 291
2. Under 43 U.S.C. § 1714(b) (1976) a publication in the *Federal Register* of notification of an application for withdrawal, which publication temporarily segregates land from the operation of the mining laws, does not withdraw the land, and therefore the notice need not be signed by the Secretary or an individual in the Office of the Secretary who has been appointed by the President, by and with the advice and consent of the Senate 462
3. The Secretary of the Interior is authorized, and is under a duty to consider and determine what lands are public lands of the United States, and after having made that determination the Secretary has the authority to determine the validity of mining claims on any public lands of the United States after adequate notice and opportunity for a hearing. A mining contest may be initiated under the authority of the Secretary of the Interior by the Bureau of Land Management at the behest of the Forest Service and prosecuted by counsel employed by the Department of Agriculture, with Forest Service employees as witnesses, where such action is in accordance with a Memorandum of Understanding between the agencies 629

SODIUM LEASES AND PERMITS

PREFERENCE RIGHT LEASES

1. In determining whether a permittee is entitled to a preference right lease the Secretary must consider all legal and economic conditions affecting the proposed operation of the lease as of the time of the determination, including the applicable statutory minimum production royalty rate. A preference right lease must provide for a production royalty rate in conformity with the statutory minimum rate applicable at the time of issuance 69

SODIUM LEASES AND PERMITS—Continued

ROYALTIES **Page**

1. In determining whether a permittee is entitled to a preference right lease the Secretary must consider all legal and economic conditions affecting the proposed operation of the lease as of the time of the determination, including the applicable statutory minimum production royalty rate. A preference right lease must provide for a production royalty rate in conformity with the statutory minimum rate applicable at the time of issuance -- 69

STARE DECISIS

1. Failure to maintain a claim by doing assessment work each year may constitute evidence of abandonment. Independently, a failure to substantially comply with the requirement that annual assessment work be performed, 30 U.S.C. § 28 (1976), requires a finding that the claim has not been "maintained" within the meaning of sec. 37 of the Mineral Leasing Act, 30 U.S.C. § 193 (1976), and may result in a forfeiture of the claim. *Hickel* v. *The Oil Shale Corp.*, 400 U.S. 48 (1970) -- 249

STATUTES

1. One seeking an exemption from the coverage of a statute, especially a statute whose purpose is corrective, must affirmatively demonstrate entitlement to that treatment ---------------------------------- 138

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

GENERALLY

1. Where a surface coal mining operation affects previously mined lands, the fact that an alleged violation could have existed before the present operation does not relieve the permittee from responsibility for the violation -- 494

ABATEMENT

Remedial Actions

1. When a permittee does not have approval from the regulatory authority for an exemption from the requirements of the Act at the time of an OSM inspection, the inspector may properly require remedial action of a reclamation nature in a notice of violation ---------------------- 435

ADMINISTRATIVE PROCEDURE

Generally

1. Affidavits to support allegations of fact in a motion for summary decision filed pursuant to 43 CFR 4.1125 are not necessary when there is no disputed issue as to any material fact ---------------- 138
2. Under 43 CFR 4.1153 OSM has an absolute right to submit an answer to a petition within 30 days from receipt of a copy of the petition. After that time, the Administrative Law Judge has discretion to regulate the scope of the answer in any reasonable manner ---------------- 187
3. The Board will not rule on the merits of a notice of violation that is not properly before it -- 324
4. Pursuant to 43 CFR 4.1161-.1162, it was error for the Administrative Law Judge not to dismiss an application for review filed with the Hearings Division after the time prescribed for such applications ---- 362
5. Under the circumstance of this case, it was error for the Administrative Law Judge to vacate a notice of violation on his own motion on the grounds that it lacked reasonable specificity as required by sec. 521(a) (5) of the Act when the parties expressed no confusion about the nature of the alleged violation ---------------------------------- 521

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977—Continued

ADMINISTRATIVE PROCEDURE—Continued

Findings Page

1. When a cessation order indicates that it is being issued both because the condition, practice, or violation is causing or can reasonably be expected to cause significant, imminent environmental harm and because there has been a failure to abate a violation listed in a notice of violation, a finding of either of those grounds is sufficient to sustain the cessation order 414

Scope of Review

1. The Interior Board of Surface Mining and Reclamation Appeals is not the proper forum to consider the constitutionality of regulations promulgated by the Secretary 643

APPLICABILITY

Initial Regulatory Program

1. The Office of Surface Mining Reclamation and Enforcement has jurisdiction to enforce the initial Federal performance standards against a surface disturbance in Kentucky of less that 2 acres and the Federal 2-acre exemption set forth in 30 CFR 700.11(b) is not applicable where the disturbance is physically related to a surface coal mining operation under permit from the Commonwealth of Virginia, and where the disturbance is not a discrete operation but was undertaken in furtherance of the Virginia operation 580

APPROXIMATE ORIGINAL CONTOUR

Generally

1. Elimination of a highwall is a specific requirement of 30 CFR 715.14 which must be satisfied in order to achieve approximate original contour. If a highwall has not been eliminated, it necessarily follows that return to approximate original contour has not been accomplished 61
2. The augering of a coal seam in an orphan highwall may make a permittee responsible for returning the entire highwall to approximate original contour 645

BACKFILLING AND GRADING REQUIREMENTS

Generally

1. Elimination of a highwall is a specific requirement of 30 CFR 715.14 which must be satisfied in order to achieve approximate original contour. If a highwall has not been eliminated, it necessarily follows that return to approximate original contour has not been accomplished 61
2. Under the circumstances of this case, sufficient evidence was presented to show that unforeseen circumstances arose during regrading, that the state regulatory authority approved a change to the permit under its established procedures, and that the change was carried out in accordance with the requirements of 30 CFR 715.14(b) 522

Highwall Elimination

1. In a steep slope mining operation all highwalls must be completely backfilled after mining is concluded, even where retention of an access road has been approved as part of a postmining land use 570
2. The augering of a coal seam in an orphan highwall may make a permittee responsible for returning the entire highwall to approximate original contour 645

Previously Mined Lands

1. The augering of a coal seam in an orphan highwall may make a permittee responsible for returning the entire highwall to approximate original contour 645

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977—Continued

CESSATION ORDERS

Generally Page

1. A cessation order is not properly issued under sec. 521(a)(2) of the Act unless the environmental harm alleged to be significant may be described objectively on the basis of observations or measurements 168
2. A cessation order is not properly issued under sec. 521(a)(2) of the Act when the evidence does not support a finding that significant environmental harm may reasonably be expected to occur before the expiration of an abatement period that would be set pursuant to sec. 521 (a)(3) of the Act 168
3. Where OSM fails to hold an informal assessment conference within 60 days of the request and the person assessed a civil penalty timely objects to the date of the conference but alleges no actual prejudice, no relief is appropriate 319
4. Where OSM fails to hold an informal assessment conference within 60 days of the request and the person assessed a civil penalty timely objects to the date of the conference but then does not forward the proposed penalty with its petition for review, the petition must be dismissed 319
5. When a cessation order indicates that it is being issued both because the condition, practice, or violation is causing or can reasonably be expected to cause significant, imminent environmental harm and because there has been a failure to abate a violation listed in a notice of violation, a finding of either of those grounds is sufficient to sustain the cessation order 414

CIVIL PENALTIES

Generally

1. 43 CFR 4.1260 does not authorize temporary relief from the requirement of 43 CFR 4.1152(b) that a proposed civil penalty be paid into escrow pending a final determination on the merits of the case 417
2. 30 CFR 723.14(a) does not authorize an Administrative Law Judge to reduce the number of days for which a civil penalty may be assessed when the obligation to abate the violation has not been suspended 417

Hearings Procedure

1. Under 43 CFR 4.1153 OSM has an absolute right to submit an answer to a petition within 30 days from receipt of a copy of the petition. After that time, the Administrative Law Judge has discretion to regulate the scope of the answer in any reasonable manner 187
2. Where OSM fails to hold an informal assessment conference within 60 days of the request and the person assessed a civil penalty timely objects to the date of the conference but alleges no actual prejudice, no relief is appropriate 319
3. Where OSM fails to hold an informal assessment conference within 60 days of the request and the person assessed a civil penalty timely objects to the date of the conference but then does not forward the proposed penalty with its petition for review, the petition must be dismissed 319

ENFORCEMENT PROCEDURES

Generally

1. The Office of Surface Mining Reclamation and Enforcement is authorized to issue a notice of violation for noncompliance with the initial regulatory program even if a state has already initiated enforcement action for the same violation 10

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977—Continued

ENFORCEMENT PROCEDURES—Continued

Generally—Continued

Page

2. The Secretary of the Interior, through the promulgation of regulations, has determined that sec. 521(a)(1) of the Act does not apply during the initial regulatory program ---------- 324
3. OSM is required to issue a notice for violations of the initial regulatory program even if a state has already taken enforcement action against the same violation ---------- 324

ENVIRONMENTAL HARM

Imminence

1. A cessation order is not properly issued under sec. 521(a)(2) of the Act when the evidence does not support a finding that significant environmental harm may reasonably be expected to occur before the expiration of an abatement period that would be set pursuant to sec. 521(a)(3) of the Act ---------- 168

Significance

1. A cessation order is not properly issued under sec. 521(a)(2) of the Act unless the environmental harm alleged to be significant may be described objectively on the basis of observations or measurements ---------- 168

EVIDENCE

Generally

1. Since the reviewing authority may use interference with an inspection against the permittee in any way deemed appropriate, a permittee who interferes with an inspection does so at the risk of severely prejudicing its own case ---------- 172
2. The existence of an intermittent stream at the time of an OSM inspection and at subsequent inspections and the statements of mine officials that an intermittent stream existed before the initial inspection raise a rebuttable presumption that an intermittent stream subject to the requirements of 30 CFR 715.17(d) existed prior to mining ---------- 383
3. Persuasive, uncontradicted evidence that the state regulatory authority considered a stream to be ephemeral before the granting of a permit, coupled with other evidence to the same effect, is sufficient under the circumstances to rebut the presumption that an intermittent stream existed prior to mining ---------- 383
4. It is not error for an Administrative Law Judge to rely on hearsay evidence of chain of custody when the permittee challenges that evidence only by asserting that it is hearsay ---------- 440
5. Under the circumstances of this case, sufficient evidence was presented to show that unforeseen circumstances arose during regrading, that the state regulatory authority approved a change to the permit under its established procedures, and that the change was carried out in accordance with the requirements of 30 CFR 715.14(b) ---------- 522
6. A prima facie case for the existence of a human burial ground can be established by evidence that stones at the purported site of the burial ground bear inscriptions generally associated with gravemarkers, combined with evidence that the site is described as a "cemetery" in a coal lease pertinent to land that includes the site ---------- 589
7. In this case, because OSM presented sufficient evidence to establish a prima facie case that the permittee had auger-mined the coal seam at the base of an orphan highwall and that that mining had an adverse physical impact on the highwall, it was error for the Administrative Law Judge to grant a motion to dismiss made at the conclusion of OSM's evidence ---------- 645

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977—Continued

HEARINGS

Generally Page

1. Since the reviewing authority may use interference with an inspection against the permittee in any way deemed appropriate, a permittee who interferes with an inspection does so at the risk of severely prejudicing its own case ---------- 172

Notice

1. Parties are entitled to written, advance notice of the time, place, and nature of a hearing to review a cessation order, in accordance with the provisions of 43 CFR 4.1123(b) and 4.1167 ---------- 309

HYDROLOGIC SYSTEM PROTECTION

Generally

1. The sedimentation pond requirement of 30 CFR 715.17(a) is a preventive measure and proof of the occurrence of the harm it is intended to prevent is not necessary to establish a violation of that requirement ---------- 207

INITIAL REGULATORY PROGRAM

Generally

1. The Secretary of the Interior, through the promulgation of regulations, has determined that sec. 521(a)(1) of the Act does not apply during the initial regulatory program ---------- 324
2. OSM is required to issue a notice for violations of the initial regulatory program even if a state has already taken enforcement action against the same violation ---------- 324
3. Sec. 521(a)(1) of the Act does not have effect during the initial regulatory program ---------- 430
4. Compliance with state mining permit conditions does not excuse noncompliance with the initial Federal performance requirements ---------- 571
5. During the initial regulatory program a critical determinant of the jurisdiction of the Office of Surface Mining Reclamation and Enforcement over a surface coal mining operation conducted on lands within a state is whether the operation is subject to state regulation within the scope of any of the initial Federal performance standards ---------- 580
6. The Office of Surface Mining Reclamation and Enforcement has jurisdiction to enforce the initial Federal performance standards against a surface disturbance in Kentucky of less than 2 acres and the Federal 2-acre exemption set forth in 30 CFR 700.11(b) is not applicable where the disturbance is physically related to a surface coal mining operation under permit from the Commonwealth of Virginia, and where the disturbance is not a discrete operation but was undertaken in furtherance of the Virginia operation ---------- 580

INSPECTIONS

Generally

1. Where extraordinary circumstances exist an entry made by an inspector without prior presentation of credentials complies with the requirements of 30 CFR 721.12(a) ---------- 59
2. An inspector may document conditions or practices discovered during an inspection that are believed to violate the Act or regulations by taking photographs ---------- 172
3. The regulation, 30 CFR 715.11(b), requiring that authorizations to operate be available for inspection at or near the minesite obligates the permittee or mine operator to maintain those authorizations where they are readily available for review by an inspector during an on-site inspection. However, if the authorizations are not immediately available and the inspector wants to review them, he or she must specifically direct that they be produced within a reasonable time ---------- 378

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977—Continued

INSPECTIONS—Continued

Generally—Continued

Page

4. An OSM inspector who, after a reasonably diligent search, does not find a mine employee with some degree of management or supervisory authority and who is not asked for indentification by other employees, may conduct an inspection without the prior presentation of credentials ---- 430

Interference

1. A permittee's refusal to allow OSM to take photographs is an interference with the inspection that is sanctionable under the Act ---- 172
2. Since no provision in the regulations makes interference with an inspection administratively sanctionable, a notice of violation is not proper ---- 172
3. Since the reviewing authority may use interference with an inspection against the permittee in any way deemed appropriate, a permittee who interferes with an inspection does so at the risk of severely prejudicing its own case ---- 172

NOTICE OF VIOLATION

Generally

1. The office of Surface Mining Reclamation and Enforcement is authorized to issue a notice of violation for noncompliance with the initial regulatory program even if a state has already initiated enforcement action for the same violation ---- 10
2. Since no provision in the regulations makes interference with an inspection administratively sanctionable, a notice of violation is not proper ---- 172
3. Where OSM fails to hold an informal assessment conference within 60 days of the request and the person assessed a civil penalty timely objects to the date of the conference but alleges no actual prejudice, no relief is appropriate ---- 319
4. Where OSM fails to hold an informal assessment conference within 60 days of the request and the person assessed a civil penalty timely objects to the date of the conference but then does not forward the proposed penalty with its petition for review, the petition must be dismissed ---- 319
5. OSM is required to issue a notice for violations of the initial regulatory program even if a state has already taken enforcement action against the same violation ---- 324
6. Violations of sec. 522(e) of the Act may be the subject of notices of violation under 30 CFR 722.12 ---- 434

Permittees

1. A permittee is a proper party to be issued a notice of violation under the Act and a lease agreement between a permittee and a private party cannot relieve the permittee from its responsibilities under the Act ---- 245

Remedial Actions

1. When a permittee does not have approval from the regulatory authority for an exemption from the requirements of the Act at the time of an OSM inspection, the inspector may properly require remedial action of a reclamation nature in a notice of violation ---- 435

Specificity

1. The failure of an OSM inspector to set forth with reasonable specificity in a notice of violation the nature of the alleged violation and the required remedial action will result in a vacation of the notice ---- 119
2. A notice of violation containing an improper citation to the regulations is reasonably specific where the narrative description of the alleged violation accurately notifies the permittee of the nature of the alleged violation ---- 304

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977—Continued

NOTICE OF VIOLATION—Continued

Specificity—Continued Page

3. Under the circumstances of this case, it was error for the Administrative Law Judge to vacate a notice of violation on his own motion on the grounds that it lacked reasonable specificity as required by sec. 521(a)(5) of the Act when the parties expressed no confusion about the nature of the alleged violation ---------- 521
4. When a notice of violation is issued on the basis of an alleged violation of a regulation, but the regulation was amended prior to the inspection, the notice may be sustained only if the condition cited clearly remains a violation under the amendments and is so stated that the permittee knows or should know the nature of the violation cited and the remedial action required ---------- 557
5. A notice of violation is reasonably specific, in accordance with 30 U.S.C. § 1271(a)(5) (Supp. II 1978), when it is sufficient to guide the review and abatement processes without actual prejudice to the recipient as the result of any ambiguity in the notice ---------- 584

PREVIOUSLY MINED LANDS

Generally

1. All surface water drainage from the area disturbed by surface mining and reclamation operations must comply with the effluent limitations of 30 CFR 715.17(a) even if it originates as contaminated ground water from previously mined areas ---------- 416
2. Where a surface coal mining operation affects previously mined lands, the fact that an alleged violation could have existed before the present operation does not relieve the permittee from responsibility for the violation ---------- 494

REVEGETATION

Generally

1. A violation of 30 CFR 715.20(c) is proven when it is demonstrated that the temporary cover of small grains, grasses, or legumes seeded by an operator is inadequate to control erosion until a permanent cover is established, and that the operator has failed to take other measures to control erosion from the disturbed area ---------- 585

ROADS

Generally

1. The exception clause in sec. 522(e)(4) of the Act is not intended to allow mining activity near the junction of a mine access or haul road with a public road; its purpose is merely to allow access or haul roads to join public roads by excepting them from the setback requirement ---------- 494
2. In a steep slope mining operation all highwalls must be completely backfilled after mining is concluded, even where retention of an access road has been approved as part of a postmining land use ---------- 570

Maintenance

1. A partially constructed access road, if used to facilitate mining operations, is a road for purposes of the initial regulatory program and therefore subject to the maintenance requirements of 30 CFR 717.17(j)(3)(i) ---------- 11

SIGNS AND MARKERS

Generally

1. The requirement of 30 CFR 715.12(b) that mine and permit identification signs be maintained until the release of all bonds is violated if such signs are not present during an inspection and the permittee has not exercised reasonable diligence to maintain them ---------- 114

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977—Continued

SIGNS AND MARKERS—Continued

Generally—Continued

Page

2. Mine identification and blasting signs must be located as required by 30 CFR 715.12(b) and (e) 430

SMALL OPERATORS

Generally

1. A party seeking to estop the Office of Surface Mining Reclamation and Enforcement from asserting that the party did not have a small operator exemption for a particular permit must clearly demonstrate its entitlement to the estoppel 138

SPOIL AND MINE WASTES

Downslope

1. "Downslope." The downslope in a multiple seam or multiple highwall mining operation is the land surface between a valley floor and the projected outcrop of the lowest coalbed being mined along each highwall, not the area between a valley floor and the projected outcrop of the lowest coalbed under permit 304, 331

STATE REGULATION

Generally

1. Under the circumstances of this case, sufficient evidence was presented to show that unforeseen circumstances arose during regrading, that the state regulatory authority approved a change to the permit under its established procedures, and that the change was carried out in accordance with the requirements of 30 CFR 715.14(b) 522

2. Because OSM is entitled to rely on the permit package as evidence of the conditions under which mining and reclamation have been approved, the failure of a state regulatory authority to require written documentation of approved permit changes to be placed in the permit package exposes a permittee to potential liability under the Act 522

3. The requirement of sec. 505(b) of the Act, 30 U.S.C. § 1255(b) (Supp. II 1978), that the Secretary of the Interior set forth any state law or regulation which is construed to be inconsistent with the Act does not impose the obligation on the Secretary of designating every state interpretation of state law which might be inconsistent with Federal law 571

4. During the initial regulatory program a critical determinant of the jurisdiction of the Office of Surface Mining Reclamation and Enforcement ment over a surface coal mining operation conducted on lands within a state is whether the operation is subject to state regulation within the scope of any of the initial Federal performance standards 580

TEMPORARY RELIEF

Generally

1. 43 CFR 4.1260 does not authorize temporary relief from the requirement of 43 CFR 4.1152(b) that a proposed civil penalty be paid into escrow pending a final determination on the merits of the case 417

Applications

1. Where an application for temporary relief includes none of the elements required by 43 CFR 4.1263, a motion to dismiss the application should be granted 177

Evidence

1. Where an applicant for temporary relief fails to provide sufficient evidence to support the showings required by sec. 525(c) of the Act, it is error to grant such relief 177

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977—Continued

TIPPLES AND PROCESSING PLANTS

At or Near a Minesite Page

1. "Surface coal mining operations." Where a coal processing facility is functionally and economically integrated with several neighboring surface coal mines but is 9 miles distant from the closest of those mines, that facility may be "near" a minesite within the meaning of "surface coal mining operations" in 30 CFR 700.5 196
2. A preparation plant which is located 1 mile from a deep mine that processes its coal through the plant and which is permitted to the same person as is the mine is both at or near the mine and operated in connection with the mine 327
3. "Surface coal mining operations." Where a coal processing facility is found to be operated in connection with a surface coal mine and is located less than 15 miles from three active surface mining pits, that facility is "near" the minesite within the meaning of "surface coal mining operations" in 30 CFR 700.5 under the circumstances of this case 347
4. "Surface coal mining operations." A coal loading facility functionally and economically integrated with a commonly controlled coal mine located 2 miles away may be "near" a minesite within the meaning of "surface coal mining operations" in 30 CFR 700.5 380
5. "Surface coal mining operations." A tipple located 200–300 feet from a minesite is a "surface coal mining operation" within the meaning of 30 CFR 700.5 when the tipple processes and stores all of the coal extracted from that mine, the mine is owned by the owners of the corporation owning the tipple, and the mine was leased in order to supply coal to the tipple 439
6. "Surface coal mining operations." When a tipple is operated in connection with two surface coal mines and is located 7 and 13 miles from those mines, that tipple is held to be "near" the minesite within the meaning of "surface coal mining operations" in 30 CFR 700.5 555
7. "Surface coal mining operations." Where a coal loading facility is found to be operated in connection with several neighboring coal mines but is 11.2 miles distant from the closest of those mines, the facility may be "near" a minesite within the meaning of "surface coal mining operations" in 30 CFR 700.5 669

In Connection With

1. "Surface coal mining operations." Where a coal processing facility is owned by the same company that owns all the mines that supply coal to it, that facility may conduct activities "in connection with" a surface coal mine within the meaning of "surface coal mining operations" in 30 CFR 700.5 196
2. A preparation plant which is located 1 mile from a deep mine that processes its coal through the plant and which is permitted to the same person as is the mine is both at or near the mine and operated in connection with the mine 327
3. Although a contract, lease, or sell-back arrangement may be sufficient to establish a connection between a coal mine and a processing facility, the nature of that arrangement must be proved 327
4. "Surface coal mining operations." Where a coal processing facility is owned and operated by the same company that owns and operates the mine

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977—Continued

TIPPLES AND PROCESSING PLANTS—Continued

In Connection With—Continued Page

supplying most of the coal to the facility, that facility is operated "in connection with" a surface coal mine within the meaning of "surface coal mining operations" in 30 CFR 700.5 under the circumstances of this case 347

5. "Surface coal mining operations." A coal loading facility controlled by the same company that owns the mine supplying coal to it may conduct activities "in connection with" a surface coal mine within the meaning of "surface coal mining operations" in 30 CFR 700.5 380
6. "Surface Coal Mining Operation." A tipple located 200–300 feet from a minesite is a "surface coal mining operation" within the meaning of 30 CFR 700.5 when the tipple processes and stores all of the coal extracted from that mine, the mine is owned by the owners of the corporation owning the tipple, and the mine was leased in order to supply coal to the tipple 439
7. "Surface coal mining operations." When a tipple is owned and operated by the same company that owns and operates the two mines supplying most of the coal processed through the tipple, that tipple is operated "in connection with" a surface coal mine within the meaning of "surface coal mining operations" in 30 CFR 700.5 554
8. "Surface coal mining operations." A coal loading facility operated and controlled by the same company that owns and operates the mines supplying coal to it is being conducted "in connection with" a surface coal mine within the meaning of "surface coal mining operations" in 30 CFR 700.5 669

TOPSOIL

Alternative Materials

1. A state regulatory authority may rely on data published by the Department of Agriculture Soil Conservation Service on established soil series in comparing native topsoil to proposed alternative materials under 30 CFR 715.16 447

VARIANCES AND EXEMPTIONS

Generally

1. One seeking an exemption from the coverage of a statute, especially a statute whose purpose is corrective, must affirmatively demonstrate entitlement to that treatment 138
2. Evidence concerning an alternative method of silt control does not show compliance with the sedimentation pond requirement of 30 CFR 715.17(a); such evidence may be presented to the regulatory authority which may grant exemptions to that requirement 207
3. The regulatory authority must specifically authorize the disturbing of an area by surface coal mining operations within 100 feet of an intermittent or perennial stream, and that requirement necessitates a variance procedure involving specific review and evaluation of proposals 334
4. When a permittee does not have approval from the regulatory authority for an exemption from the requirements of the Act at the time of an OSM inspection, the inspector may properly require remedial action of a reclamation nature in a notice of violation 435
5. When a permittee alleges that a violation of the effluent limitations of 30 CFR 715.17(a) occurred because of unusual precipitation conditions, under 30 CFR 715.17(a)(1) it bears the burden of demonstrating entitlement to an exemption from those limitations 557

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977—Continued

WATER QUALITY STANDARDS AND EFFLUENT LIMITATIONS Page

Generally

1. When a permittee alleges that a violation of the effluent limitations of 30 CFR 715.17(a) occurred because of unusual precipitation conditions, under 30 CFR 715.17(a)(1) it bears the burden of demonstrating entitlement to an exemption from those limitations ---------- 557

Discharges from Disturbed Areas

1. All surface water drainage from the area disturbed by surface mining and reclamation operations must comply with the effluent limitations of 30 CFR 715.17(a) even if it originates as contaminated ground water from previously mined areas ---------- 416
2. A violation of 30 CFR 715.17(a) for failure to pass surface drainage through a sedimentation pond may be established for a surface coal mining operation that is not required by a state to have a permit by showing that there is surface drainage, that it does not pass through a sedimentation pond, and that it leaves the disturbed area ---------- 438

Sedimentation Ponds

1. The sedimentation pond requirement of 30 CFR 715.17(a) is a preventive measure and proof of the occurrence of the harm it is intended to prevent is not necessary to establish a violation of that requirement ---- 207
2. The sedimentation pond requirement of 30 CFR 715.17(a) and 717.17(a) is a preventive measure and proof of the harm it is intended to prevent is not necessary to establish a violation of that requirement ---------- 325
3. A violation of 30 CFR 715.17(a) for failure to pass surface drainage through a sedimentation pond may be established for a surface coal mining operation that is not required by a state to have a permit by showing that there is surface drainage, that it does not pass through a sedimentation pond, and that it leaves the disturbed area ---------- 438

WORDS AND PHRASES

1. "*Cemetery.*" The term cemetery as it is used in sec. 522(e)(5) of the Act, 30 U.S.C. § 1272(e)(5) (Supp. II 1978), may include a private burial ground ---------- 589
2. "*Downslope.*" The downslope in a multiple seam or multiple highwall mining operation is the land surface between a valley floor and the projected outcrop of the lowest coalbed being mined along each highwall, not the area between a valley floor and the projected outcrop of the lowest coalbed under permit ---------- 304, 331
3. "*Permit area.*" During the initial regulatory program, when a facility otherwise included within the meaning of "surface coal mining operations" is not specifically covered by a permit, the "permit area" is at least coextensive with the disturbed area ---------- 381
4. "*Permit area.*" During the initial regulatory program, when a facility otherwise included within the meaning of "surface coal mining operations" is not specifically covered by a permit, the "permit area" is at least coextensive with the disturbed area ---------- 437
5. "*Surface coal mining operations.*" Where a coal processing facility is owned by the same company that owns all the mines that supply coal to it, that facility may conduct activities "in connection with" a surface coal mine within the meaning of "surface coal mining operations" in 30 CFR 700.5 ---------- 196

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977—Continued

WORDS AND PHRASES—Continued Page

6. "*Surface coal mining operations.*" Where a coal processing facility is functionally and economically integrated with several neighboring surface coal mines but is 9 miles distant from the closest of those mines, that facility may be "near" a minesite within the meaning of "surface coal mining operations" in 30 CFR 700.5 196
7. "*Surface coal mining operations.*" Where a coal processing facility is owned and operated by the same company that owns and operates the mine supplying most of the coal to the facility, that facility is operated "in connection with" a surface coal mine within the meaning of "surface coal mining operations" in 30 CFR 700.5 under the circumstances of this case 347
8. "*Surface coal mining operations.*" Where a coal processing facility is found to be operated in connection with a surface coal mine and is located less than 15 miles from three active surface mining pits, that facility is "near" the minesite within the meaning of "surface coal mining operations" in 30 CFR 700.5 under the circumstances of this case 347
9. "*Surface coal mining operations.*" A coal loading facility controlled by the same company that owns the mine supplying coal to it may conduct activities "in connection with" a surface coal mine within the meaning of "surface coal mining operations" in 30 CFR 700.5 380
10. "*Surface coal mining operations.*" A coal loading facility functionally and economically integrated with a commonly controlled coal mine located 2 miles away may be "near" a minesite within the meaning of "surface coal mining operations" in 30 CFR 700.5 380
11. "*Surface coal mining operation.*" A tipple located 200–300 feet from a minesite is a "surface coal mining operation" within the meaning of 30 CFR 700.5 when the tipple processes and stores all of the coal extracted from that mine, the mine is owned by the owners of the corporation owning the tipple, and the mine was leased in order to supply coal to the tipple 439
12. "*Surface coal mining operations.*" When a tipple is owned and operated by the same company that owns and operates the two mines supplying most of the coal processed through the tipple, that tipple is operated "in connection with" a surface coal mine within the meaning of "surface coal mining operations" in 30 CFR 700.5 555
13. "*Surface coal mining operations.*" When a tipple is operated in connection with two surface coal mines and is located 7 and 13 miles from those mines, that tipple is held to be "near" the minesite within the meaning of "surface coal mining operations" in 30 CFR 700.5 555
14. "*Surface coal mining operations.*" A coal loading facility operated and controlled by the same company that owns and operates the mines supplying coal to it is being conducted "in connection with" a surface coal mine within the meaning of "surface coal mining operations" in 30 CFR 700.5 669
15. "*Surface coal mining operations.*" Where a coal loading facility is found to be operated in connection with several neighboring coal mines but is 11.2 miles distant from the closest of those mines, the facility may be "near" a minesite within the meaning of "surface coal mining operations" in 30 CFR 700.5 669

SURFACE RESOURCES ACT

(*See also* Hearings, Mining Claims—if included in this Index.)

Page

GENERALLY

1. Sec. 3 of the Surface Resources Act of July 23, 1955, 69 Stat. 367, 368, 30 U.S.C. § 611 (1976), declared that common varieties of sand and gravel are not valuable mineral deposits under the mining laws. In order for a claim for such material to be sustained as validated by a discovery, the prudent man-marketability test of discovery of a valuable mineral deposit must have been met at the date of the Act, and reasonably continuously thereafter ---- 386

WITHDRAWALS AND RESERVATIONS

EFFECT OF

1. A mining claim located on land temporarily segregated from appropriation under the mining laws pursuant to 43 U.S.C. § 1714(b) (1976) is null and void ab initio ---- 462
2. Under 43 U.S.C. § 1714(b) (1976) a publication in the *Federal Register* of notification of an application for withdrawal, which publication temporarily segregates land from the operation of the mining laws, does not withdraw the land, and therefore the notice need not be signed by the Secretary or an individual in the Office of the Secretary who has been appointed by the President, by and with the advice and consent of the Senate ---- 462
3. Where land is withdrawn from the operation of the mining laws subsequent to the location of a mining claim, the validity of the claim cannot be recognized unless the claim was supported by a valid discovery at the time of the withdrawal. In addition, even though there may have been a proper discovery at the time of a withdrawal or at some other time in the past, a mining claim cannot be considered valid unless the claim is at present supported by a sufficient discovery. The loss of the discovery, either through exhaustion of the minerals, changes in economic conditions, or other circumstances, results in the loss of the location ---- 629

REVOCATION AND RESTORATION

1. In determining whether a national defense withdrawal, within the meaning of § 11(a)(1) of ANCSA, existed on Dec. 18, 1971, only the formal legal status of the withdrawal may be considered, and it is immaterial whether the purpose of the withdrawal has been fulfilled or whether the actual use to which the land is put has changed ---- 123
2. The Army's filing of a notice of intent to relinquish certain property cannot revoke a national defense withdrawal because the Army lacks the authority to revoke such withdrawals ---- 124
3. A notice of intent to relinquish property is not a relinquishment but a method by which an agency of the Federal Government expresses the intention to relinquish the property at a future time, upon completion of required statutory and regulatory procedures ---- 124
4. The issue of whether ANCSA supersedes certain provisions of the Federal Property and Administrative Services Act, as regards administrative actions taken concerning a specific withdrawal, is rendered moot by a finding that the withdrawn lands were never available for selection under ANCSA. When a notice of intention to relinquish affects lands not withdrawn pursuant to ANCSA, BLM is required to follow the provisions of the Federal Property and Administrative Services Act, and the regulations promulgated under that Act ---- 124

WORDS AND PHRASES

Page.

1. "*Interest in an oil and gas lease or offer.*" Where a party to a pooling agreement is authorized to advance funds for filing of drawing entry cards in simultaneous oil and gas lease drawings, payment of rentals, and office expenses, and is entitled to be reimbursed therefor with interest and receive a consultation fee from the pooled proceeds of any leases issued, all parties to the agreement have an interest in each lease offer within the meaning of 43 CFR 3102.7, requiring the disclosure of interested parties -- 465

U.S. GOVERNMENT PRINTING OFFICE : 1981 O - 338-173